COPY 02-597 No. (2)

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

MICHAEL WAYNE JENNINGS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL WAYNE JENNINGS,
Petitioner-Appellant,

v.

JEANNE WOODFORD,
Warden of the California State Prison
at San Quentin,
Respondent-Appellee.

No. 00-99008

D.C. No. CV-89-01360-WAI

OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Argued and Submitted,
September 25, 2001 -- San Francisco, California

Filed May 10, 2002

Before: Betty B. Fletcher, Thomas G. Nelson, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL:

Gilbert Eisenberg and Marianne D. Bachers, San Francisco, California, for the petitioner-appellant.

John Deist, California Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

B. FLETCHER, Circuit Judge:

In February 1984, a jury in Contra Costa County, California, convicted Michael Wayne Jennings of first degree murder, forcible rape, first degree burglary, and robbery. After finding that Mr. Jennings had intentionally committed the murder during the commission of the rape, burglary, and robbery - a special circumstance permitting capital punishment - the jury voted to impose the death penalty. Mr. Jennings appeals the district court's denial of his petition for a writ of habeas corpus. He seeks reversal of both his sentence and his conviction.

Mr. Jennings claims his trial counsel was unreasonably and prejudicially ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), by failing to investigate or present mental health defenses in either the guilt or penalty phases of his capital trial. He further argues that his trial counsel was constitutionally ineffective because of multiple conflicts of interest. Because the State provides no basis upon which to conclude that a reasonable tactical decision motivated trial counsel's abject failure to discover and consider vast and easily obtainable information about Mr. Jennings' fragile and failing mental health - information that would have made a non-first degree conviction reasonably probable - we find that Mr. Jennings was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment during the guilt phase of his trial. Because we reverse based on guilt phase ineffectiveness, we need not reach questions about counsel's conflicts of interest or incompetence

during the penalty phase. We reverse both Mr. Jennings' death sentence and his conviction and remand with instructions to grant the writ unless the state decides to retry Mr. Jennings.

FACTUAL BACKGROUND

I. Violet Newman's Murder

Sixty-three-year-old Violet Newman died on August 7, 1982 after withstanding multiple traumatic injuries during a rape and apparent robbery. Among other gruesome injuries, Ms. Newman suffered fourteen stab wounds to the chest and abdomen, a severed carotid artery and jugular vein, bruising and abrasions consistent with rape, and ligature marks suggesting she was bound with rope by her neck and ankles.

Substantial circumstantial evidence connected Michael Wayne Jennings to the crime. Specific evidence underlying the prosecution's guilt case included the following: [1]

- Mr. Jennings had known the victim for much of his life, having lived next door to her at his parents' home and grown up with her children.

- Strapping tape found in Ms. Newman's home bearing Mr. Jennings' thumb and palm prints matched tape found in his pickup truck.

- The truck also contained rope identical to some found near the victim and appeared to match ligature marks on her neck and ankles.

- Police found a piece of Ms. Newman's answering machine and blood matching hers in Mr. Jennings' truck.

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1. *See People v. Jennings,* 46 Cal.3d 963 (1988).

- Mr. Jennings, a secretor,[2/] had had a successful vasectomy several years before the murder. Aspermatic semen containing antigens consistent with his blood was found on the victim.

- Someone made a phone call from the victim's home at 2:19 a.m. to a Ms. Joanne Boechne, a friend and former girlfriend of Mr. Jennings unknown to the victim. Mr. Jennings had tried to reach Ms. Boechne earlier in the evening.

- Several hours after the murder, a wet Mr. Jennings reported to friends that he had taken a whirlpool bath. Ms. Newman owned a whirlpool tub.

- On the night of the murder, Mr. Jennings lost a knife whose blade length was consistent with the victim's stab wounds.

- Mr. Jennings volunteered facts about the crime that had not been publicly released to both police and friends.

II. Investigation & Trial

On the night of the murder, petitioner attended a bachelor party at which he took methamphetamine and consumed alcohol. Numerous sources noted that he was an habitual, heavy methamphetamine user. Although no witness could testify that Mr. Jennings had been at the party all night, his trial counsel relied primarily on an alibi defense as well as suggestions of an alternate perpetrator. In a surprise blow to the defense that came to light only at trial, a mix-up regarding daylight savings time prevented the defense from being able to establish an alibi for Mr.

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2. "[A]n individual of blood group A, B, or AB who secretes the antigens characteristic of these blood groups in bodily fluids (as saliva)" Merriam-Webster On Line: Collegiate Dictionary. (2002) htt://www.merriam-webster.com/dictionary.htm (Apr. 25, 2002).

Jennings at the time the call to Ms. Boechne was placed from the victim's home.

Apart from acknowledging Mr. Jennings' drug use on the night of the crime, Petitioner's trial counsel, Michael Oliver, did not present any evidence during the guilt phase about his client's mental health despite considerable evidence - detailed below - suggesting that drug use and underlying mental problems contributed to Mr. Jennings' actions and mental state.

III. Jury Verdict & Subsequent History

The jury deliberated from the afternoon of February 7, 1984 to the afternoon of February 9, 1994 before finding petitioner guilty on all counts. The penalty phase testimony and argument ended on February 27, 1984; the jury began deliberations that afternoon and returned a death penalty verdict the following morning. The California Supreme Court upheld the judgment. *People v. Jennings*, 46 Cal.3d 963, 251 Cal. Rptr. 278, 760 P.2d 475 (1988). The U.S. Supreme Court denied certiorari. *Jennings v. California*, 489 U.S. 1091, 103 L. Ed. 2d 862, 109 S. Ct. 1559 (1989).

After the California Supreme Court denied his state habeas corpus petition, Mr. Jennings petitioned for habeas corpus relief in the U.S. District Court for the Northern District of California.

Respondent moved for summary judgment on April 29, 1994. Petitioner subsequently moved for summary judgment on his conflict of interest claim. On May 5, 1998, the district court issued a decision denying Mr. Jennings' Motion for Summary Judgment on the conflict claim and granting summary judgment to Respondent on all but three claims. The district court granted an evidentiary hearing on the three remaining claims, through which petitioner alleged: (1) he received ineffective assistance of counsel at the guilt and penalty phases; (2) he was not competent to aid and assist counsel at trial; and (3) he was impermissibly shackled at trial. We discuss facts adduced at the

evidentiary hearing with respect to Mr. Jennings' ineffective assistance of counsel claim in detail below.

Following a ten-day evidentiary hearing, Judge Ingram issued an Order and Judgment denying Mr. Jennings habeas relief. Petitioner timely filed a Notice of Appeal. The district court issued a certificate of probable cause on the same day. The issues remaining on appeal are Mr. Jennings' claims that he received ineffective assistance of counsel at both the guilt and penalty phases of his trial because of (1) trial counsel's failure to adequately investigate and present information about mental health, drug abuse, and family background at both the guilt and penalty phases of petitioner's trial and (2) trial counsel's numerous conflicts.

JURISDICTION

Because Mr. Jennings filed his notice of appeal after the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), appellate procedures created under AEDPA govern. *Slack v. McDaniel*, 529 U.S. 473, 478, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000). Pursuant to 28 U.S.C. § 2253(c)(1), a generalized Certificate of Probable Cause (CPC) like that issued by the district court in this case is no longer sufficient to confer jurisdiction on this court. Instead, Fed. R. App. P. 22(b) authorizes us to issue a Certificate of Appealability (COA) with respect to particular issues. *Silva v. Woodford*, 279 F.3d 825, 832 (9th Cir. 2002). A COA in turn gives us jurisdiction over the merits in accordance with 28 U.S.C. §§ 2253 and 2254.

Pursuant to Fed. R. App. P. 22(b)(2) we treat petitioner's appeal from the district court's ruling as an application for a COA. *Schell v. Witek*, 218 F.3d 1017, 1021 n.4 (9th Cir. 2000) (en banc). We may issue a COA for any issue with respect to which petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Supreme Court recognized in *Slack v. McDaniel* that the "substantial showing" standard for a COA is relatively low and is the same as the prior standard for issuance of a CPC apart from the requirement that the court identify specific appealable issues. *Slack*, 529 U.S. at 483. This standard, articulated in *Barefoot v. Estelle*, 463 U.S. 880, 893, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983), permits appeal where petitioner can "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at n.4 (internal quotation marks and citations omitted). The *Barefoot* court noted that "in a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of [appealability]." *Id.* at 893. The court must resolve doubts about the propriety of a COA in the petitioner's favor. *Lambright*, 220 F.3d 1022, 1025 (9th Cir. 2000) (en banc).

Pursuant to the foregoing standard and "taking a quick look at the underlying merits," *Lambright*, 220 F.3d at 1028, we issue a COA with respect to Mr. Jennings' allegation that his trial counsel failed adequately to investigate and present considerable evidence regarding petitioner's psychological and family history that might have (1) defeated the jury's finding of the requisite intent for first degree murder in the guilt phase or (2) provided sufficient mitigating evidence to warrant a sentence of life rather than death in the penalty phase. If true, these allegations amount to a denial of the constitutional right to the effective assistance of counsel. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) (finding ineffective assistance where counsel, for no plausible strategic purpose, failed to investigate records of child abuse, borderline retardation, and possible brain damage); *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997) (finding ineffectiveness where counsel delegated responsibility for psychiatric investigation to law student, neglected to provide for complete psychiatric examination, and failed to discover family history of mental illness and child abuse). We find that the issues are debatable under the *Barefoot* standard and therefore conclude that a COA is appropriate.

We also issue a COA with respect to Mr. Jennings' allegation that he received ineffective assistance of counsel due to his attorney's multiple alleged conflicts of interest. Under *Cuyler v. Sullivan*, 446 U.S. 335, 350, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980), Mr. Jennings may prevail on a Sixth Amendment claim if he demonstrates that (1) defense counsel was actively representing conflicting interests and (2) the conflict had an adverse effect on counsel's performance. Here, Petitioner alleges that trial counsel's partnership with a conflicted attorney and his prior representation of three testifying witnesses - Mr. Jennings' ex-wife, whom counsel represented in her divorce from Mr. Jennings, Mr. Jennings' former sister-in-law, and a friend with whom Petitioner took drugs - represented active conflicts that adversely affected counsel's performance in a variety of ways. Where representation of different clients is successive, a conflict may arise where cases are "substantially related" or the conflict causes the attorney to "divide[]his loyalties." *Thomas v. Municipal Court of the Antelope Valley Judicial District of California*, 878 F.2d 285, 288 (9th Cir. 1989). Whether or not Mr. Oliver's multiple representations were sufficiently related to Mr. Jennings' trial to give rise to "active" conflicts is a debatable point upon which reasonable jurists might disagree, and thus the COA threshold test is met.

We decline to issue a COA with respect to Mr. Jennings' claim that the district court erred by permitting psychiatrist Dr. James Missett to testify at the evidentiary hearing held as part of that court's habeas proceedings. Even if, as Mr. Jennings alleges, the district court's decision to limit cross-examination regarding Dr. Missett's small claims suits to recoup unpaid client fees was somehow in error, petitioner fails to show how this would amount to a "substantial showing of the denial of a constitutional right," and thus a COA is improper.

STANDARD OF REVIEW

We review a district court's denial of a petition for a writ of habeas corpus de novo. *Smith v. Stewart*, 241 F.3d 1191, 1195 (9th Cir. 2001). An ineffective assistance of counsel claim presents a mixed question of

law and fact and is reviewed de novo. *Seidel v. Merkle*, 146 F.3d 750, 753 (9th Cir. 1998). We review the district court's factual findings for clear error. *Id.*

Because Mr. Jennings initiated his appeal prior to AEDPA's 1996 effective date, that Act's more stringent requirements for habeas relief do not apply to our review of the merits in this case. *Lindh v. Murphy*, 521 U.S. 320, 327, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997). (As discussed above, AEDPA does govern the requirement that this court issue a COA.)

DISCUSSION

Petitioner argues that counsel's failure to conduct any investigation into possible mental defenses was unreasonably ineffective and deprived him of his Sixth Amendment right to the effective assistance of counsel at both the guilt and penalty phases of his capital trial. With respect to the guilt phase, respondent counters that counsel, Mr. Oliver, had determined - in part as a result of petitioner's insistence on his innocence - to pursue an alibi defense and thus did not need to investigate potential mental defenses that would be inconsistent with an innocence claim. Petitioner argues that, even if counsel ultimately did not present a mental defense, he was obliged to conduct a reasonable investigation in order to make a well-informed strategic decision not to present such evidence. Mr. Jennings contends that evidence of his severe mental health and drug problems may well have resulted in a second degree murder or manslaughter conviction, obviating the need for a penalty phase and ensuring that petitioner would not be put to death.[3/] Because

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3. Apparently trying to hedge his bets despite his failure to present any experts or substantial testimony beyond an acknowledgment that petitioner had used drugs on the night of Ms. Newman's murder, Oliver nonetheless requested and received second degree murder and manslaughter instructions for the jury's consideration.

we agree with Mr. Jennings, we need not address ineffectiveness arguments addressed to the penalty phase.

I. *Strickland v. Washington* and the Duty to Investigate

In *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970), the U.S. Supreme Court declared that "the right to counsel is the right to the effective assistance of counsel." Later, in the 1984 case *Strickland v. Washington*, the Court laid out the now familiar yardstick by which the effectiveness of counsel should be measured. In *Strickland*, the Court propounded a two prong test whereby a defendant claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.[4/]

Elaborating on the requirements of *Strickland*'s first prong -- commonly known as the "effectiveness prong" - the *Strickland* Court expressly declined to articulate specific guidelines for attorney performance beyond highly generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the duty to advocate the defendant's cause, and the duty to communicate with the client over the course of the prosecution. *Id.* The *Strickland* Court was adamant that defense counsel's duties not be defined so exhaustively as to give rise to a "checklist for judicial evaluation ... [because] any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making

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4. *Strickland* itself addressed defendant Washington's claim that his attorney – led in part by a sense of "hopelessness" – rendered ineffective assistance by failing to investigate or present mitigating evidence about the defendant's background, character, and mental state during the sentencing phase of Washington's trial. *Strickland*, 466 U.S. at 673.

tactical decisions." *Id.* The court clarified that review of an attorney's performance must be "highly deferential" and must adopt the counsel's perspective at the time of the challenged conduct in order to avoid the "distorting effects of hindsight." *Id.* at 689. A reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ... [and] the defendant must overcome the presumption that ... the challenged action 'might be considered sound trial strategy.' " *Id.* (citation omitted).

Construing the Sixth Amendment to guarantee not effective counsel per se but a fair proceeding with a reliable outcome, the *Strickland* Court concluded that demonstrating that counsel fell below an objective standard of reasonableness alone is insufficient to warrant a finding of ineffective assistance. In addition, in order to satisfy *Strickland*'s second prong the defendant must show that the attorney's sub-par performance prejudiced the defense. *Id.* at 691-692. The defendant must affirmatively prove prejudice. The test is whether there is a reasonable probability that, but for the attorney's challenged conduct, the result of the proceeding in question would have been different. The Court defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Applying its test, the *Strickland* Court made clear that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. More recently, the Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), reiterated the requirement that a defense attorney conduct appropriate investigations, finding both ineffectiveness and prejudice where counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395.

As our own precedent makes clear, an attorney's failure to investigate may amount to constitutionally deficient performance in either the guilt phase or the penalty phase of a capital case. *See, e.g., Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997) (holding counsel was constitutionally ineffective due to failure to obtain psychiatric evidence in a timely fashion and prepare a key psychiatric expert); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) (finding constitutionally infirm performance where counsel "failed to adequately investigate, develop, and present mitigating evidence to the jury even though the issue before the jury was whether [the defendant] would live or die.").

II. Counsel's Guilt Phase Performance

Mr. Jennings argues that Michael Oliver rendered constitutionally ineffective representation during the guilt phase of Mr. Jennings' trial by failing to investigate mental health and drug abuse issues that might have raised reasonable doubt about Mr. Jennings' ability to form the requisite intent to justify a first degree murder conviction and, by extension, the possibility of the death penalty. We look first to *Strickland*'s effectiveness prong to determine whether Mr. Oliver's representation was sufficient.

Prior to conflicting out of the case, Mr. Jennings' first attorney, Carol Babington, engaged Dr. Hjortsvang, a psychiatrist, to conduct a preliminary interview with Mr. Jennings. Ms. Babington made it clear in her testimony at the district court's evidentiary hearing that this interview -- which lasted only two hours -- was meant to be preliminary and was not meant to rule out any potential mental defenses. Instead, it was meant as a preliminary assessment of Mr. Jennings' competency and as a tool to establish a baseline for Mr. Jennings shortly after his arrest.

Mr. Oliver, who claims that Ms. Babington told him that petitioner was "Okay," requested no further investigation and never spoke with Dr. Hjortsvang in person until after the guilt phase of Mr. Jennings' trial.

Nor did he request copies of Mr. Jennings' voluminous medical records.

Nor did he instruct Gail Cates, the paralegal to whom he delegated preparation of the penalty phase, to inquire into possible child abuse in the Jennings family.

Nor did he seek the appointment of additional experts to evaluate Mr. Jennings' mental state or the possible effects of methamphetamine on such a heavy, long-time user, despite the fact that Mr. Oliver knew a syringe had been found in Mr. Jennings' car and that he knew his client had reported to the police that he had been "strung out on goddamn crank for over a year. That's why I was having such a hard time remembering what the hell I was doing and where."

Nor did he discuss the effects of Mr. Jennings' drug use with his client or others who observed him under the influence of methamphetamine.

Nor did he follow up on the report of Theresa Jennings - Mr. Oliver's former divorce client and Mr. Jennings' former wife - that Mr. Jennings had attempted suicide, that a psychiatrist had told her ex-husband he was schizophrenic, and that she believed he was crazy.[5/]

Nor did he investigate an incident - of which he had knowledge - in which a judge ordered Mr. Jennings committed involuntarily for psychiatric evaluation because he appeared catatonic.

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5. Mr. Oliver was also privy to another apparent suicide attempt as a result of his representation of Theresa Jennings in her divorce proceedings against Mr. Jennings. In the 1976 divorce, the former Mrs. Jennings alleged that Mr. Jennings had intentionally driven his car into a tree.

Nor did he review stacks of medical records - subpoenaed by the district attorney for review by a special master - save to be certain that his client had, in fact, had a vasectomy.

Nor did he look into Mr. Jennings' teenage commitment to a Boys' Ranch for molesting an eight-year-old and a six-year-old.

Although he admits that his tactics might have been different had he not been mistaken about the time of the call made to Ms. Boechne from Ms. Newman's home - a mistake that destroyed an already weak alibi defense - Mr. Oliver claims he did not conduct any investigation into possible mental defenses because he had settled early on an alibi defense. Although defense counsel is empowered to make such strategic decisions, Strickland demands that such decisions be reasonable and informed. *Strickland*, 466 U.S. at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

The district court determined that Mr. Oliver had made a reasonable and informed decision because it concluded that the defense attorney lacked notice that Mr. Jennings had any mental problems and thus had no reason to conduct an investigation. The district court relied on *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), which held that, where nearly twenty hours of mental health evaluation by defense experts revealed no basis for a mental defense, defense counsel was justified in his decision not to conduct further investigation into the matter.

The district court inaccurately analogized the *Hendricks* fact situation to that of Mr. Jennings. The *Hendricks* court acknowledged what *Strickland* mandates: that attorneys have considerable latitude to make strategic decisions about what investigations to conduct once they have gathered sufficient evidence upon which to base their tactical choices. In *Hendricks*, the attorney had hired experts who found no evidence of mental disorders after lengthy examination specifically geared toward finding any possible defenses. In the instant case, by

contrast, the testimony and declarations of Carol Babington, Dr. Hjortsvang, and even Michael Oliver himself indicate that Dr. Hjortsvang's two hour interview of Mr. Jennings was very preliminary and was not meant to specifically rule out mental defenses; Mr. Oliver ruled out those defenses not because he concluded after reasonable investigation that they were not viable, but because he settled instead on an alibi defense and abandoned all investigation into psychiatric factors.

The district court went on to distinguish *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998) and *Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998). *Turner* did not deal with failure to investigate mental defenses, but failure to investigate and prepare any defense in a murder case. *Turner*, 158 F.3d at 456. The district court concluded that Jennings' case could not be considered similar because Mr. Oliver's dereliction with respect to the mental defense investigation was not as egregious as Turner's attorney's because Mr. Oliver did have the benefit of a psychiatrist's opinion - based on a two-hour evaluation - that Mr. Jennings was competent to stand trial. The district court misconstrued the standard *Strickland* imposes. We are not to determine whether it is possible to find a worse attorney, but whether a particular defendant received representation sufficient to satisfy the Sixth Amendment. The fact that there are worse attorneys in the world does not change a bad attorney's lack of diligence into a tactical choice.

Addressing *Seidel v. Merkle*, wherein we found trial counsel ineffective for failing to investigate the defendant's mental state, the district court focused on the fact that counsel in that case was on notice that the defendant had mental problems. *Seidel*, 146 F.3d at 755. The district court found particularly significant the fact that the defense in *Seidel* relied on negating intent. *Id.* at 757. By contrast, the district court found, the defense in Mr. Jennings' case was that the defendant did not commit the homicide at all.

This analysis misses the point. Mr. Oliver was obliged to thoroughly investigate Mr. Jennings' case in order to determine whether a mental state defense might have been better than the alibi defense he

had "settled on" early. Moreover, the record makes clear that Mr. Oliver was, in fact, on notice about Mr. Jennings' mental health and drug abuse problems.

Mr. Oliver knew, for example, that Mr. Jennings was a long-term methamphetamine addict who had used the drug on the night of the homicide. Mr. Oliver knew his client had told police he had been "strung out" on the drug for over a year. And that he had attempted suicide. And that his ex-wife told police he was "crazy" and had been diagnosed as schizophrenic. And that he had a long history of injuring himself intentionally and pouring liquids in the resulting wounds, thereby causing gangrene. And that he had been involuntarily committed by a judge for psychiatric evaluation. And that he appeared to have been coming off drugs during his videotaped interview with police. And that the newly-minted paralegal Mr. Oliver had hired thought there was something "seriously wrong" with Mr. Jennings. And that friends and coworkers agreed.

Respondents correctly caution that we must consider the prevailing legal norms at the time Mr. Oliver represented Mr. Jennings. *Strickland*, 466 U.S. at 689. They point once again to *Hendricks v. Calderon*, where some twenty hours of expert examination revealed no basis for a mental defense. In *Hendricks*, we held that, "certainly, in 1981, *Hendricks*' attorneys did not believe they had any duty to investigate Hendricks' social history in the face of the unanimous opinions of their own experts that there was no basis for a mental defense." *Hendricks*, 70 F.3d at 1039. Even if we assume, as the district court concluded, that a correct reading of *Hendricks* would excuse a failure to investigate where an expert had only been called in to evaluate competence and had only met with the defendant for two hours, as was true in Mr. Jennings' case, that case is inapplicable for one simple reason: Mr. Jennings was not tried in 1981.

Mr. Jennings was tried in California in 1983. Shortly before Mr. Jennings' trial, the California Supreme Court decided *People v. Mozingo*, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (Cal. 1983). The

Mozingo court adopted a referee's finding that "a possible conflict between a diminished capacity and an alibi defense would not excuse counsel's failure initially to investigate the potential strengths of a 'mental defense' vis-a-vis an uncorroborated alibi defense." *Id.* 671 P.2d at 367 (emphasis in original). *Mozingo* concluded that counsel's inaction meant he could not have made informed tactical and strategic decisions, and that "counsel's inadequate representation thereby deprived defendant of a potentially meritorious defense or mitigating circumstance." *Id.* *Mozingo* thus articulated an effectiveness standard for California attorneys.

Not only was *Mozingo* available to Mr. Oliver, we know for a fact that he was aware of the decision. In Mr. Jennings' case, the prosecutor actually brought *Mozingo* to the judge's attention, expressing concern that Mr. Oliver had not properly investigated substantial medical records and that the failure could provide grounds for appeal. Confronted with the concern in open court, Mr. Oliver assured the court that he had discharged his duty -- a statement that runs counter to Mr. Oliver's admission that he did not in fact review any of the medical records save those discussing his client's vasectomy.

We find that, even in 1983, the information Mr. Oliver acknowledges he possessed would have put a reasonable attorney on notice that he needed to investigate mental health and drug-related issues more thoroughly when defending a client against a charge - first degree, capital murder - for which raising a reasonable doubt as to intent could be crucial. See, e.g., *Seidel*, 146 F.3d at 755-56. We also hold that the district court clearly erred in finding that Mr. Oliver made a tactical decision not to conduct any investigation into possible mental defenses. It is within the realm of possibility - consistent with *Hendricks* - that it would not have been ineffective to make a tactical decision to eschew a mental defense had Mr. Oliver performed a thorough investigation and consulted with his client. But Mr. Oliver did not make such an informed, strategic choice. Because he settled on a very weak alibi defense before conducting any investigation that might have led to a reasoned tactical

choice, Mr. Oliver was ineffective within the meaning of *Strickland*'s first prong.

But our analysis does not end here. We must determine whether, had Mr. Oliver undertaken the necessary investigation, it is reasonably probable that the outcome of Mr. Jennings' trial would have been different. *Strickland*, 466 U.S. 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052. A reasonable probability does not mean that we must determine that the jury more likely than not would have returned a verdict for something beside first degree murder, but only that Mr. Jennings has shown "a probability sufficient to undermine confidence in the outcome." *Id.*

At the district court's evidentiary hearing, several witnesses testified to what Mr. Oliver would have found had he undertaken a sufficient investigation. Although Dr. Hjortsvang died prior to the evidentiary hearing, his declaration addressing the significance of the information he did not have when conducting his preliminary evaluation is also part of the record.

Dr. Karen Gudiksen, a psychiatrist experienced with methamphetamine users, testified about what a thorough psychiatric evaluation - as opposed to the cursory, preliminary two hour exam Dr. Hjortsvang was asked to perform - would have revealed for purposes of the guilt phase. Because she focused on the first phase of Mr. Jennings' trial, Dr. Gudiksen concerned herself with information that might have negated the intent element of first degree murder and militated in favor of a conviction for a lesser offense.

To conduct her examination, Dr. Gudiksen reviewed considerable evidence available to Mr. Oliver and any experts he might have employed for Mr. Jennings' trial, including police reports, the juvenile court file, divorce files, military records, a life chronology, declarations by family and friends, jail medical records, and a medical history she characterized as "complicated and extensive." Through her investigation, Dr. Gudiksen uncovered, among other things, a documented family

history of mental illness including paranoid schizophrenia and severe alcoholism; consistent beatings of Mr. Jennings and his brothers by both parents throughout the boys' childhoods; molestation by both his grandfather and his mother; and a pattern of self-mutilation that began when Mr. Jennings was just six years old and that resulted in repeated bouts of gangrene when Mr. Jennings exacerbated the wounds with foreign agents such as toothpaste and battery acid.

Dr. Gudiksen's evaluation also revealed that, during the period leading up to Ms. Newman's murder, Mr. Jennings - at least partly as a result of his heavy methamphetamine use - was experiencing psychotic symptoms including hallucinations, delusions, memory gaps and periods of dissociation. Dr. Gudiksen concluded that the deleterious effects of Mr. Jennings' drug use worsened his underlying mental illness; with respect to the latter, Dr. Gudiksen concluded that Mr. Jennings "began the psychotic system of dissociating as a young boy. He probably manifested the psychotic sign of limited range of affect at about the same time. There were episodes of serious depression, with self-mutilations and overt suicidal acts. His psychotic diagnosis best fits under the category of schizoaffective disorder." Dr. Gudiksen concluded that, at the time of the crime, Mr. Jennings was psychotic and dissociated. She found that he could not form the intent to kill, rape, rob, or burglarize, nor to premeditate or deliberate.

In his declaration, Dr. Hjortsvang explained the significance of the information he did not have available when he conducted his preliminary examination. After the fact, Dr. Hjortsvang reviewed Mr. Jennings' life history, declarations of family and friends, jail medical records, and the declarations of Dr. Gudiksen and mitigation expert Dr. Mindy Rosenberg. Referring to this information as "extremely important to consider in reaching an accurate and reliable assessment of Michael Jennings' mental state at the time the crime occurred," he concluded that, had he had the information when he first interviewed Mr. Jennings in 1982 and then met with him again just prior to the penalty phase, "it likely would have caused me to reach a different conclusion about his mental state." Dr. Hjortsvang told the court, "I am in agreement that at

the very least, the amphetamine psychosis evidence could have been presented as a guilt phase defense in this case."

In rebuttal, the state called a psychiatrist, Dr. James Missett. Dr. Missett, who did not examine Mr. Jennings personally but did review all the records, thought that Dr. Hjortsvang's notes evidenced a "relatively complete" and "thorough" psychiatric exam. He also disputed Dr. Gudiksen's determination that Mr. Jennings suffered from schizoaffective disorder and amphetamine psychosis the night Ms. Newman was killed. He also called into question Dr. Gudiksen's conclusions that Mr. Jennings lacked the ability to deliberate and to form the intent to commit the crime. Whether or not Dr. Missett's detailed testimony is persuasive, neither his testimony nor Dr. Hjortsvang's nor Dr. Gudiksen's was ever presented to a jury that could have weighed the evidence and made its own determination as to Mr. Jennings' mental state.

In *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), we addressed a case similar to Mr. Jennings'. In *Bloom*, trial counsel had delegated the investigation and preparation of mental defenses to a third year law student (much as Mr. Oliver left penalty phase preparation in the hands of a newly credentialed paralegal with no background in capital cases). *Id.* at 1271-72. Although the attorney in Bloom at least presented a psychiatric expert when his client faced three first degree murder charges at trial, his failure to follow through on the law student's work resulted in the psychiatrist having only 1.5 hours to talk with the defendant pre-trial - roughly the same amount of time Dr. Hjortsvang had to evaluate Mr. Jennings. *Id.* at 1272. On appeal, new counsel discovered considerable evidence available to trial counsel, including a family history of mental illness, child abuse, and spousal abuse; the defendant's exposure to prescription drugs with psychiatric side effects; a psychiatrist's recommendation that defendant receive inpatient care; and a jail psychologist's finding that defendant suffered from hallucinations. As Dr. Hjortsvang did in the instant case, the trial psychiatric expert submitted a declaration post-sentencing saying he had been provided insufficient information to make an accurate evaluation and that, upon

review of all the relevant information, he believed Mr. Bloom had a mental disease that prevented him from appreciating the nature of his actions. *Id.* at 1274. Like Dr. Hjortsvang, Mr. Bloom's psychiatrist reported that the new information would have been "critical to any reliable assessment of ... mental functioning at the time of the offenses ... I viewed my original report as an effort to assess, on the basis of a brief interview, [Defendant's] ability to stand trial and to formulate a psychiatric diagnosis." *Id.* at 1274-75.

In *Bloom*, we concluded that trial counsel had been prejudicially ineffective during the guilt phase. We held that, "the complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance. Counsel left the responsibility of obtaining and preparing this key witness to a third-year law student who, due to counsel's lack of diligence, had no idea what defense theory counsel intended to pursue." *Id.* at 1277. Quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994), we found in *Bloom* that "describing [counsel's] conduct as 'strategic' strips that term of all substance." *Bloom*, 132 F.3d at 1277. We found that trial counsel put the defendant's mental state at issue and that the defense depended at least in part on negating the premeditation and malice necessary to justify a first degree murder conviction. *Id.* at 1278.

In *Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998), we again found counsel prejudicially ineffective for failing to conduct a reasonable investigation of guilt phase mental defenses. As in the instant case, Seidel's counsel made no investigation into his client's psychiatric history despite "abundant signs in the record that Seidel suffered from mental illness." *Id.* at 755. We focused on counsel's duty under *Strickland* to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* As we have done here, we concluded that counsel's inaction could not be viewed as "strategic" where he "failed to conduct even the minimal investigation that would have enabled him to come to an informed decision." *Id.* at 756.

Particularly relevant to Mr. Jennings' case, in *Seidel* we noted in our discussion of prejudice that, "it is particularly curious that counsel requested and received jury instructions for both voluntary and involuntary manslaughter, but failed to present any evidence or argument to support a manslaughter finding." *Id.* at 757. Mr. Oliver likewise secured jury instructions for second degree murder and manslaughter, but did not present any evidence at trial to cast doubt on Mr. Jennings' ability to form the requisite intent for first degree murder.[6/]

We conclude that a reasonably effective attorney who had undertaken an appropriately diligent investigation would likely have opted for a mental defense strategy. Because Mr. Jennings' alibi defense was weak and uncorroborated, and given the wealth of mental health and drug abuse evidence at the ready, effective counsel almost certainly

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6. At the time of the homicide and Mr. Jennings' trial, California defined degrees of murder as follows:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree.

Cal. Pen. Code § 189 (1981). California defined manslaughter as "the unlawful killing of a human being without malice" and voluntary manslaughter as a manslaughter committed "upon a sudden quarrel or heat of passion." Cal. Pen. Code § 192 (1981).

would have made an effort to raise reasonable doubt as to Mr. Jennings' intent and his ability to undertake a "willful, deliberate, and premeditated killing" and his ability to act with "malice."[7/] Cal. Pen. Code §§ 189 and 192 (1981).

We further find that it is reasonably probable that the jury - which deliberated for two full days before rendering its guilty verdict despite the overwhelming evidence that Mr. Jennings killed Ms. Newman - would have returned a verdict for second degree murder or manslaughter, both of which were presented as options, but neither of which was argued or supported by the case Mr. Oliver presented. Because the jury spent as long as it did deliberating, it is reasonably probable that, apprised of all of the mental health and drug abuse evidence, it would have found a reasonable doubt as to Mr. Jennings' ability to form the intent required for a first degree murder conviction. Although we cannot be certain that the result would have been different, we find the probability of a different result "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Therefore, Mr. Oliver's ineffective performance was prejudicial.

CONCLUSION

Michael Oliver's unreasonable failure to investigate psychiatric evidence and possible medical defenses fell below the minimal standard of effectiveness that can be reasonably expected of defense counsel. Mr. Oliver's ineffective assistance prejudiced Mr. Jennings by depriving him of the opportunity to help his counsel make informed judgments as to his defense and potentially to have a defense presented that would have

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7. Even had Mr. Oliver stuck to the alibi defense, had he undertaken an appropriate investigation into Mr. Jennings' mental health he may have been able to switch gears and marshal an effective argument to save his case after the only evidence corroborating the alibi unexpectedly evaporated at trial.

negated the mental state necessary for a first degree murder conviction. Because we reverse Mr. Jennings' conviction as a result of Mr. Oliver's ineffectiveness during the guilt phase, we do not reach Mr. Jennings' penalty phase claim. Likewise, we do not determine whether Mr. Oliver's conflicts of interest would also require reversal.

We reverse the district court's denial of a writ of habeas corpus, vacate Mr. Jennings' conviction, and remand to the district court with instructions to grant the petition for a writ of habeas corpus unless the State within a reasonable period grants a new trial.

REVERSED AND REMANDED WITH INSTRUCTIONS. CONVICTION VACATED. REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO REMAND TO THE STATE COURT FOR A NEW TRIAL.

FILED JUNE 19, 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL WAYNE JENNINGS,

Petitioner - Appellant,

v.

JEANNE WOODFORD, Warden of the California State Prison at San Quentin,

Respondent - Appellee

No. 00-99008

D.C. No. CV-89-01360-WAI

ORDER

BEFORE: B. FLETCHER, T.G. NELSON, and BERZON, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judges T.G. Nelson and Berzon voted to deny the petition for rehearing and Judge B. Fletcher so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

Filed February 17, 2000

Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
In The United States District Court
For the Northern District of California

MICHAEL WAYNE JENNINGS,
Petitioner,
v.
ARTHUR CALDERON, Warden,
CALIFORNIA STATE PRISON AT
SAN QUENTIN

No. C-89-1360-WAI

JUDGMENT

The Petition for Writ of Habeas Corpus having come duly on for consideration and having been considered as to all claims except Claims 4, 6, and 20 upon Motion for Summary Judgment and said Motion for Summary Judgment having been granted in favor of Respondent as to said claims and having been considered as to Claims 4, 6, and 20 by means of evidentiary hearing and briefing and argument thereon and the Application for the Writ having been also denied as to those claims,

IT IS ORDERED, ADJUDGED AND DECREED that the Petition for Habeas Corpus is **DENIED** and the action is dismissed.

DATED: 2 17 00

/s/
WILLIAM A. INGRAM
United States District Judge

Filed February 17, 2000
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

In the United States District Court
for the Northern District of California

MICHAEL WAYNE JENNINGS,
Petitioner,

v.

ARTHUR CALDERON, Warden of
California State Prison at San Quentin,
Respondent.

No. C-89-1360 WAI

ORDER DENYING WRIT OF
HABEAS CORPUS

INTRODUCTION

Pending before this court are Claims 4, 6, and 20 (Ineffective Assistance of Counsel, Incompetence to Stand Trial, and Shackling in Front of Jury) of Michael Wayne Jennings' Petition for Writ of Habeas Corpus, the remainder of the claims having been previously dismissed upon Respondent's Motion for Summary Judgment. The court held an evidentiary hearing on these three surviving claims commencing on April 29, 1999, and concluding on June 1, 1999.

For the reasons to be detailed below, the court hereby DENIES the Writ as to claims 4, 6 and 20 in their entirety.

DISCUSSION

I. CLAIM 6 (INCOMPETENCE)

Very little evidence was adduced at the hearing regarding this claim and Petitioner fails to even address it in his initial post-hearing brief. In his reply brief Petitioner formally withdrew his claims for relief from his judgment and sentence on this basis. Nevertheless, given that the court has held an evidentiary hearing on the issues presented by this claim and Respondent has briefed them fully, the court will address the merits of this claim.

In ruling on Respondent's motion for summary judgment of this claim, the court held that to sustain an incompetence claim a petitioner must demonstrate by at least a preponderance of the evidence that he did not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and that he did not have a "rational [or] factual understanding of the proceedings against him." *See* Order of May 5, 1998, p. 32, lines 16-22, *quoting Cooper v. Oklahoma,* 517 U.S. 348, 134 L.Ed.2d 498, 506 (1996).[8/] The court held that, based upon this standard, Petitioner might be entitled to relief upon the testimony of a psychiatric expert that he was in fact incompetent at the time of his trial. *Id.* at p. 33, lines 3-4.

At the evidentiary hearing Dr. Karen Gudiksen testified by reading into the record her declaration's conclusory statement that Petitioner's "mental illness and the medications prescribed for him after arrest precluded him from effectively aiding and assisting his attorney through pretrial and trial of this case." RT 874; *and see* Respondent's Exh. HH, ¶ 72. She also read into the record her declaration's recitation of the medications that Petitioner was given during the pre-trial and trial stages, his own report of how these medications affected him, and the report of witness Donna Gwin that Petitioner "giggled" during the trial. RT 847-

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8. At line 19 of the May 5, 1998 Order, the word "competence" should re "incompetence."

849. She concluded that "perhaps he was a bit overmedicated at least some of those times" and that the prescriptions decreased his "understanding and awareness and alertness" from time to time. RT 849-850. It was pointed out that Dr. Gudiksen did not interview trial counsel, his paralegal, or any jail personnel regarding their observations of Petitioner's demeanor during his trial (RT 902), although she did review the declaration of the paralegal testifying to his inappropriate behavior (RT 957-959).

Donna Gwin testified that she observed Petitioner giggling with his attorney during the trial. RT 201. Paralegal Gail Cates testified that Petitioner "would laugh. He would turn around and talk to his friends and his family in a loud voice . . . while testimony was going on . . . as if the gravity of the situation never hit [him]." RT 985-986.

Respondent's expert, Dr. James Missett, testified that the amount of medication prescribed to Petitioner was "an ordinary dose" and that he did not display any signs of overreaction. RT 1544; *see also* Resp. Exh. CC, p. 24 ("No drug hangover"). He noted the lack of any cited basis for Dr. Gudiksen's conclusion that Petitioner was overly sensitive to the medications (RT 1545-1546), and the lack of any indication in the record that he was actually unable to understand the proceedings or to cooperate with his counsel (RT 1546). Dr. Missett concluded that the record, in fact, demonstrated that Petitioner was competent at the time of his trial. RT 1541; *see also* RT 1537-1538.

Evidence before the court on this issue also includes trial expert Dr. Kenneth Hjortsvang's two examinations in which he found that Petitioner was "not psychotic" although he had "socio tendencies" and was "rather hedonistic" (see Resp. Exh. BB at p. 20) and that he had "no thought disorder" (Resp. Exh. CC at p. 25). According to the testimony, Dr. Hjortsvang reported to the defense attorneys that Petitioner was "okay." RT 1087; 1088-1089. Attorney Michael Oliver and paralegal Cates also observed him to be cooperative and alert. *See* RT 1090; 1026. As evidence of Petitioner's lucidity and involvement in the trial decisions, Oliver noted that Petitioner resisted putting on a mental state

defense, insisted upon an alibi defense, and initially refused to allow Oliver to present a penalty phase case at all. RT 1148; 1152-1153; 1179; *and see* Resp. Exh. PP at ¶ 2. Cates stated that Petitioner did not appear to have any mental impairment and agreed with Oliver's opinion that Petitioner "would have reacted badly" to the suggestion of a mental defense. RT 1026;1029.

Finally, the transcript of the state court proceedings reveals that the Superior Court addressed the issue of Petitioner's competency on at least two occasions. Transcript of Superior Court Trial (TrRT) at 824-828; 4101-4103 ("THE COURT: . . . "I'm satisfied I don't have anybody that's 1368[9] or even coming close to it in front of me . . .").

No witness ever described Petitioner with words such as "erratic," "irrational," "bizarre" or any similar term nor did any witness testify to any incident occurring during the trial which even remotely indicated Petitioner's inability to understand and participate in the proceedings. *See Boag v. Raines,* 769 F.2d 1341, 1343 (9th Cir. 1985), *cert. denied* 474 U.S. 1085 (1986). To the contrary, the testimony pointed a picture of a man of at least average intelligence who actively participated in trial strategy, was interested in and attuned to his surroundings, and who was aware that he was on trial for murder and faced a potential death sentence.

The court's own review of the record of the Superior Court proceedings corroborates this impression. Petitioner was always addressed as an intelligent and rational participant in the proceedings. The only time he demonstrated a lack of full awareness was when he was experiencing some physical pain and had taken some over-the-counter medication and, as a result, was feeling drowsy.[10] As soon as the judge

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9. Cal. Penal Code § 1368 regards the procedures to follow if the defendant appears mentally incompetent to the court.

10. Mr. Oliver also testified that there was one episode

learned of this situation he adjourned the proceedings. TrRT 824. There is no indication whatsoever from this record that the participants felt that Petitioner was in any way impaired and there is ample indication that they would not have proceeded had they believed he was. The observations and behaviors of those who took part in Petitioner's trial carry the most weight in this court's opinion.

In sum, although Dr. Gudiksen did testify that Petitioner was incompetent at the time of his trial, this lone opinion, reached on the basis of a cold record, without personal knowledge and without speaking to persons who observed his behavior at the time in question, and made with little expressed rationale, does not outweigh the aggregate of the opposing evidence tending to show that he was competent. Thus, Petitioner has failed to carry his burden.

The claim that Petitioner was incompetent to assist in his own defense is denied.

II. CLAIM 20 (SHACKLING)

Petitioner has also formally abandoned this claim. Again, in the interest of thoroughness and in light of the parties' completed efforts in presenting this claim through evidence and briefing, the court shall address its substance.

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during the trial in which Petitioner, in the presence of the jury suddenly began cursing and mumbling. RT 1136. He stated that the judge broke immediately and gave him time with his client and proceedings resumed only after Petitioner assured the judge that he could go on. *Id.* The court could not find reference to this particular incident in the trial record but even if it did occur as Mr. Oliver remembers, it only reinforces the impression that the trial judge was extremely sensitive to the defendant's mental state and would not have allowed the trial to continue if there was any hint that he was incompetent.

In granting Petitioner's Motion for an Evidentiary Hearing on this claim, this court stated that "Petitioner will be required to prove that the shackling denied him a fair trial before he will be entitled to a new trial." Order of May 5, 1998 at p. 61:9-10.

The only evidence presented at the hearing related to the claim that Petitioner was observed in shackles by the jury went to the fact of the shackling, where it occurred and who might have seen it. No evidence as to prejudice was adduced. No argument on the subject was made in Petitioner's post-hearing briefs.

Gail Cates testified that during breaks in the proceedings Petitioner would be handcuffed to a wooden bench in the public corridor. RT 986. She stated that she knew "for a fact" that members of the jury observed him while he was handcuffed to the bench. RT 986-987.

Michael Oliver initially testified that he did not remember Petitioner being "shackled or handcuffed in any way in the courtroom." RT 1208. On later questioning by Petitioner's counsel he clarified his recollection: he explained that Petitioner was never "shackled," that is, never restrained by chains, but at times he was brought into the courtroom wearing handcuffs which were then immediately removed by the bailiff and that he was certain that the jury observed this. RT 1217; 1221-1223. Oliver also confirmed that Petitioner was occasionally cuffed to the public bench during trial recesses and that the jury observed him there. RT 1217-1219. He stated that he had no doubt that the jury was fully aware that Petitioner was in custody. RT 1219.

No jurors testified either live or by affidavit.

The authorities discuss shackling in terms of that occurring inside the courtroom and that occurring outside the courtroom. None that the court could find address the precise issue of the removal of handcuffs immediately inside the courtroom doors while the jury is present. The leading Ninth Circuit case on the subject, however, *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999), makes clear that due process requires a trial

court to weigh the security risks posed by the defendant against the harm to the presumption of innocence, to the defendant's mental abilities and ability to communicate with counsel, and to the decorum of the trial before it may constitutionally order a defendant shackled in the presence of the jury. *Id.* at 636; *and see Castillo v. Stainer,* 983 F.2d 145, 147 (9th Cir. 1993), *cert. denied* 510 U.S. 1014 (1993). If no such analysis and consideration of less restrictive alternatives is performed, shackles which are visible to the jurors in the courtroom will warrant the granting of habeas relief. *Id.* On the other hand, "[a] jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom has not warranted habeas relief" unless the defendant can show actual prejudice. *Id.* "Similarly, when the defendant's shackling was not actually seen by the jury during the trial, [courts] have held that the shackling was harmless error." *Id.*

The evidence which was presented in this case tends to show that the jury regularly observed Petitioner handcuffed to a bench in the public hallway during breaks in the trial proceedings and occasionally saw the bailiff removing and replacing Petitioner's handcuffs at the start and end of each session. None of this evidence is conclusive, however, as no jurors have testified to their actual observations.

As to the out of court observations, if any, there can be no relief because Petitioner has not demonstrated any prejudice. *See Rhoden,* 172 F.3d at 636; *United States v. Olano,* 62 F.3d 1180, 1190 (9th Cir. 1995), *cert. denied* 519 U.S. 931 (1996); *United States v. Halliburton,* 870 F.2d 557, 560-61 (9th Cir. 1989), *cert. denied* 492 U.S. 910 (1989).

While the in court incidents are more troubling given the authorities, the court must conclude that the Petitioner has failed to carry his burden of establishing that any juror actually saw him wearing handcuffs during the trial. Only Michael Oliver spoke to the issue and he unequivocally stated that Petitioner was never shackled inside the courtroom except when he was in the process of being transported. RT 1223. There is no direct evidence that any jurors actually observed the cuffs at any point. *See Wright v. Texas,* 533 F.2d 185, 187 (5th Cir. 1976)

("[W]here there is no proof that any juror saw the petitioner in handcuffs, the petitioner has failed to carry his burden to show that he was prejudiced in any significant manner. A 'significant possibility' is not sufficient to carry the petitioner's burden of demonstrating the necessary fact by a preponderance of the evidence."). Moreover, these courtroom observations, if in fact any occurred, were brief and "low key." *Id.* The Ninth Circuit has noted that the "[c]haining of a prisoner in transport to [and presumably from] the courtroom is a different matter." *Castillo v. Stainer,* 983 F.2d at 147.

The only published decision in a habeas case to find a denial of due process by unjustified shackling involved the "painful shackling of defendant's hands for 17 months." *Rhoden,* 172 F.3d at 636, *referring to Spain v. Rushen,* 883 F.2d 712 (9th Cir. 1989), *cert. denied* 495 U.S. 910 (1990). In that case, Spain was visibly shackled, during the trial, with "leg irons, a waist chain to which each of his hands was bound by individual chains about eight inches long, and chains that apparently held him to his chair." *Spain,* 883 F.2d at 714. This court has previously concluded in another habeas case before it that brief viewings of a defendant's handcuffs being removed as he entered the courtroom "do not rise to the level required for inherent prejudice to be shown." *Ghent v. Calderon,* Civ. Case No. 90-2763, N.D. Cal. Order of March 18, 1999, at p. 9.[11/]

As stated, Petitioner has not briefed the issues outlined by the Petition and the court's prior order nor the evidence presented in connection with his shackling claim and claims now to give up his right to relief on this issue. The claim that Petitioner was unconstitutionally displayed to his jury in shackles is therefore denied, for the failure to pursue the matter and because the claim lacks support in the evidence.

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11. In any event, by failing to object to the procedure at trial, Petitioner has waived the claim here. *See Wright,* 533 F.2d at 187.

III. CLAIM 4 (INEFFECTIVE ASSISTANCE OF COUNSEL)

The controlling cases are *Strickland v. Washington,* 466 U.S. 668 (1984), and *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), *cert. denied*, 488 U.S. 900 (1988). Based upon these authorities and those that followed and refined them, and as explained below, the court finds that counsel was not constitutionally ineffective during either phase of Petitioner's trial.

A. Guilt Phase

Under *Strickland* one who claims ineffective assistance must affirmatively show that counsel's performance was so defective that he was not functioning as the counsel guaranteed by the Sixth Amendment and that there is a reasonable probability that absent counsel's errors the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694. As stated in *Waters v. Thomas,* 46 F.3d 1506, 1512 (11th Cir. 1995), *cert. denied* 516 U.S. 856 (1995): "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."

Moreover, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 455 U.S. at 691. "Although there is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance, . . . counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994).

In this case, Petitioner contends that counsel's failure to investigate Petitioner's mental health and family abuse history led him to the erroneous decision to try the case with an alibi and "other perpetrator" defense rather than a mental state defense. He argues that had trial

counsel obtained the psychiatric opinions that habeas counsel did, he would have been able to argue that Petitioner was unable to premeditate and deliberate at the time of the murder. Furthermore, he argues, once the appropriate background information and expert opinions were in counsel's possession, it would have been objectively unreasonable to choose an alibi defense over a mental defense. As required by *Strickland,* Petitioner then contends that if a mental defense had been utilized, the jury would probably have found him not guilty of the murder.

In *Hendricks v. Calderon,* 70 F.3d at 1032, the petitioner had claimed that his trial attorney failed to adequately investigate his background, "particularly his alleged history as a victim of sexual abuse and possible genetic predisposition to various psychiatric disorders, . . . [and that] the defective investigation provided an inadequate basis for counsel's strategic decision not to pursue a mental defense." *Id.* at 1037. Nearly identical allegations are made here. The case is similar in many factual respects also. After interviewing Hendricks, the defense experts informed trial counsel that they could find no basis for a mental defense. There, too, a mental defense "could be pursued only at substantial strategic cost" since the introduction of psychiatric testimony would have opened the door for admission of evidence of Hendricks' other murder convictions. *Id.* However, the appellate court agreed with the district court's conclusion, following an evidentiary hearing, that trial counsel did not make an "uninformed or baseless choice" when he decided to forego further investigation into possible guilt phase mental defenses. The Ninth Circuit ultimately affirmed the district court's denial of the writ with regard to the guilt phase. *Id.* at 1037-1038.

Although the experts in *Hendricks* interviewed the defendant for a total of almost 20 hours and in the instant case Dr. Hjortsvang's initial interview with Petitioner was substantially more abbreviated, *Hendricks* does not rely on the length of the interviews for its conclusion. Rather, *Hendricks* holds that an attorney, in 1981, did not have an affirmative duty to investigate his client's "social history" absent a request from his expert that such information be obtained and specifically rejects the

argument that a failure to do so undermines an expert's conclusions to such an extent that any strategic choices by the attorney made thereon are unreliable. *Id.* at 1038, *citing Card v. Dugger,* 911 F.2d 1494, 1512 (11th Cir. 1990), *and Bloom v. Vasquez,* 840 F.Supp. 1362, 1370 (C.D.Cal. 1993), *reversed on other grounds,* 132 F.3d 1267, *and cert. denied* 523 U.S. 1145 (1998). There is no indication in *Hendricks* that an attorney is ineffective for accepting the assessment of a psychiatric expert following an interview shorter than that conducted in *Hendricks.*

In this case, Oliver was told that the expert had found no basis for a mental defense. The opinion was not qualified due to the length of the interview or the extent of the background information. Dr. Hjortsvang did not suggest that additional tests or investigation might yield a different diagnosis. His notes reveal that he did inquire into background issues with Petitioner, and, although self-reporting may be unreliable (RT 1301-1302), Hjortsvang did not report that anything seemed incomplete or fallacious or merited further exploration. As stated in *Hendricks* an attorney is entitled to rely on his expert's unqualified conclusion and

> To hold otherwise would raise the Sixth Amendment hurdle well above the floor of minimal competence, requiring attorneys to have the specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices. By forcing lawyers to second-guess their experts, the position Hendricks argues would effectively eliminate the legitimate role experts play in guiding and narrowing an attorney's investigation.

Hendricks, 70 F.3d at 1039.

The court concludes that Oliver's failure to make a further investigation into Petitioner's mental health issues, including fleshing out his social history, does not make his representation ineffective.

Petitioner's citation to *Turner v. Duncan,* 158 F.3d 449 (9th Cir. 1998), and *Seidel v. Merkle,* 146 F.3d 750 (9th Cir. 1998), *cert. denied* 119 S. Ct. 850 1999), are inapposite. In *Turner*, retained counsel failed to follow up on the psychiatric report obtained by the public defender who had initially represented Turner and, indeed, did not even recall reviewing any psychiatric report. *Turner,* 158 F.3d at 453. In fact, the dereliction in *Turner* extended to all aspects of trial preparation and the decision granting relief for ineffective assistance of counsel was not based on a failure to pursue a mental state investigation alone. The court found that trial counsel failed "to perform even the most basic investigative tasks." *Id.* His trial preparation consisted of a review of the preliminary hearing transcript and a twenty to forty minute interview with Seidel. *Id.* He did not "investigate witnesses, follow up on the psychiatric reports, undertake discovery, research any legal issues, or call any witnesses other than petitioner." *Id.* at 454. Counsel's lack of preparation was "startling" and "inexplicable." His failure to investigate the mental state issues was even more appalling "given that the entire defense strategy rested on contesting the intent element of the crime." *Id.* at 457. These facts cannot be seriously compared to those in the instant matter wherein counsel received an expert psychiatric report that there were no mental defenses available and then actively investigated and pursued an alibi/other perpetrators defense.

Similarly, in *Seidel*, "trial counsel had conducted no investigation whatsoever of Petitioner's mental state . . . despite the fact that he was put on notice." *Seidel,* 416 F.3d at 753; *and see* 755-756 ("There were abundant signs in the record . . . nevertheless, trial counsel failed to conduct any investigation at all;" "evidence in the record that counsel was actually aware of the mental problems;" "did not obtain Seidel's military, prison, or medical records, . . . failed to interview any witnesses . . . never requested that any mental or psychiatric evaluations be performed . . . *etc.*). Again, this situation is distinguishable from the present case in that Oliver possessed an expert opinion leading him to believe that there were no bases for a mental defense and he was given no signs that should have caused him to doubt this opinion's reliability. Moreover, as in *Turner*, the defense in *Seidel* depended on the

petitioner's mental state, making the failure to make an investigation into that area the more egregious. *Id.* at 757. By contrast, here the claim was that Petitioner did not even commit the homicide.

Petitioner's attorney effectiveness expert, Michael Burt, testified that, despite its risks, the mental state approach would have been substantially preferable to the factual defense that Oliver elected to rely upon. RT 1358-1361. The court does not find this testimony to be persuasive. While the fact-based defense was also risky given the "overwhelming" identity evidence and the ambiguity of the testimony placing Petitioner at the party, it was a reasonable choice under the circumstances. Moreover, the Petitioner favored the approach which did not place his mental state in issue and strongly communicated this preference to counsel and to paralegal Gail Cates. *See, e.g.,* RT 1029. In addition to the alibi evidence, Oliver presented evidence that the murder and rape were committed by a person other than, and unconnected to, the Petitioner. This defense was aided by the presence of a vehicle outside the victim's home which had been associated with a series of burglaries of the homes of elderly women. It was also significantly aided by the vehicle identification testimony of the very same deputy sheriff who was then serving as the courtroom bailiff and whom defense counsel considered to have a satisfactory relationship with the trial jury, the members of which were in his charge. RT 1154-1156; 1180. Although the evaluation of the attorney's performance cannot be influenced by hindsight (*see, e.g. Bonin v. Calderon,* 59 F.3d 815, 833 (9th Cir. 1995), *cert. denied* 516 U.S. 1051 (1996)), in this instance even the benefits of hindsight do not make the choice of one approach over the other an obvious one.

In any case, it cannot be said that the Petitioner's mental state was wholly ignored by Oliver in the guilt phase. Sufficient evidence of Petitioner's inability to form the requisite intent to commit murder or to perform the "acrobatics" necessary to commit the crime due to his drug and/or alcohol intoxication on the evening in question was adduced so as to permit Petitioner to request and receive instruction on "Voluntary Intoxication - When Relevant to Specific Intent" (CALJIC 4.21 (1981

Revision) and on "Manslaughter Defined" (CALJIC 8.37 (1979 Revision). CT 1085; 1044.

The court finds that, under the circumstances, it was not unreasonable for Oliver to try the underlying case on an alibi/other perpetrators theory rather than a mental state theory. He believed that there was a strong alibi in that he had witnesses who could place Petitioner at the bachelor party at the time that the phone records showed a call being placed form the victim's home to Petitioner's ex-girlfriend.[12/] He had evidence that other suspicious individuals had been observed in the area of the crime. Moreover, he had no indication that Petitioner suffered from any mental impairment based upon his own observations, those of public defender Carol Babington, and most importantly, the report of Dr. Hjortsvang. He also knew that any mental defense would result in the prosecution's introduction of rebuttal evidence and competing expert testimony. In this court's estimation this would have been a very dangerous strategy and one that would only have been justified in the absence of any other possible defense. As stated in *Hendricks*:

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12. The fact that this approach lost some effectiveness when the phone company witness testified that the records had not been adjusted for daylight savings time was an unfortunate turn. However, Oliver's failure to discover this fact before trial has never been formally alleged in this court or in the state courts as evidencing ineffective assistance of counsel. Therefore, the court may not consider the failure to depose the phone company witness prior to trial in connection with the Sixth Amendment claim. *See Correll v. Stewart,* 137 F.3d 1404 (9th Cir. 19997), *cert. denied* 119 S.Ct. 450 (1998). In any event, it does not appear to the court that reliance by counsel on the business records of a public utility without deposing the custodian of those records was unreasonable. Indeed, in the instant case both sides apparently placed reliance upon the records as they appeared on their face. To find ineffectiveness of counsel on this basis smacks of prohibited hindsight.

> The Sixth Amendment does not hold an attorney responsible for the difficulty of the case he inherits. The choice to pursue a bad strategy makes no comment on an attorney's judgment where no better choice exists.

Hendricks, 70 F.3d at 1042.

The court concludes that trial counsel was not constitutionally ineffective in his choice of and presentation of the guilt phase defense. The decision to utilize an alibi and "other perpetrator" defense was reasonable under the circumstances. Petitioner has not shown that a mental defense would have probably altered the outcome. The claim that trial counsel rendered ineffective assistance at the guilt phase is therefore denied.

B. Penalty Phase

The same standards, presumptions, and deferences apply when examining the conduct of the penalty phase of Petitioner's trial.

This portion of the claim presents the court with a somewhat more difficult question. On the one hand, it seems patently unreasonable not to use all the evidence at hand that might engender sympathy from a penalty jury. But three factors in this case move this decision toward a denial of Petitioner's habeas claim: first, and foremost, trial counsel did not possess the extent of evidence that habeas counsel has developed and presented to this court; second, trial counsel knew that the admission of character evidence at the penalty phase would throw the door wide open to the highly damaging evidence of Petitioner's record of child molestation and other anti-social behavior which he had managed to keep from the jury up to that point; and third, the presentation of the defense contemplated by the testimonies of Petitioner's doctors, Karen Gudiksen and Mindy Rosenberg, *relied* upon the acts of molestation and the addiction to drugs and would have required their introduction by the defense itself.

The first point raises the question of counsel's competence in failing to discover the mental health related evidence but the court finds that counsel could not have been expected to detect the alleged family history through the veil of secrecy the Jennings had apparently lowered over their domestic culture. *See* RT 53-54. While his investigator, Gail Cates, has testified that Oliver told her to only look for "good things" about the Petitioner and that he rebuffed her attempts to inform him of her suspicions that "there was something very seriously wrong," in fact, the only such matters she attempted to inform him of related to Petitioner's own mental health and not to the possibility that there had been enduring and pervasive abuse in the family. *See* RT 973; 975-978. She testified that she knew nothing "whatsoever" about abuse within the Jennings family and that only in retrospect did she feel that they might have been withholding something in their discussions with her. RT 980; 997. Gail Cates spent 50 hours interviewing Randy Jennings and his wife and not once was the subject of familial abuse of any sort brought up. RT 998-999; and *see* 1010. The record is clear that the evidence of Petitioner's childhood obtained by habeas counsel was very difficult to extract from the family and ultimately was only corroborated by one witness. "Counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Matthews v. Evatt*, 105 F.3d 907, 920 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 102 (1997).

The fact is that the Petitioner's childhood allegations are supported almost entirely by the testimony of Petitioner's brother, Randy Jennings although his mother, Pearl Jennings, confirms that Randy was beaten by his father on one occasion and that Michael was hit by his father's hand several times through the years. RT 1801-1802. She stated that all of the boys were hit hard at times. RT 1801. While Randy's extensive testimony was credible on its face it must also be considered in light of his demonstrated desire to aid his brother's cause. The record shows Randy Jennings' refusal to sign the statement which he gave to the police after he learned of his brother's arrest, stating that it did not reflect what he had actually told them when interviewed just after the murder was discovered.

None of the other witnesses could support Randy's portrayal of his family life. Family members Hester Sapp and Edna Jenson, while acknowledging verbal hostility between the parents and between the parents and the children, do not support sustained abusive cruelty. RT 149-151. Hester Sapp once observed Petitioner with bruises but, other than the verbal fighting, observed no departure from normal familial practices. RT 131. Brad Meeks, who grew up with the Jennings brothers, testified to no observations consistent with abusive practices. RT 254. As noted, even Gail Cates, who spent over 100 hours interviewing the family in preparation for the penalty phase, received no inkling that the drastic and long-term abuse described by Randy Jennings was visited upon the four Jennings boys as they grew up. Significantly, neither of the other two brothers came forward at the evidentiary hearing to corroborate Randy's account.

This is not to say that the court necessarily believes that Randy is lying. It is certainly possible that the memories of parental brutality were so deeply buried and that the "family culture" of secrecy was so ingrained that the silence could only now be broken. Perhaps Petitioner's other brothers have repressed their own dark past. Conceivably, the beatings and cruelty were well-hidden behind closed doors and a public face of happiness and normalcy. But these are just speculations. The weight of the contrary evidence cannot be ignored and the court must find that Petitioner has not sustained his burden of proving that he actually suffered a childhood of abuse. More to the point, however, because the evidence of mistreatment was so difficult to obtain and because its actual occurrence even now remains uncertain, Oliver's failure to uncover it and to provide it to his expert or otherwise use it in mitigation of penalty was not unreasonable.

This case is thus distinguishable from *Hendricks*, in which the Circuit affirmed the district court's holding that petitioner's counsel had been ineffective in the sentencing phase of the trial by failing to conduct any investigation into mitigating evidence, in that there was no reasonable mitigation case to discover here. Unlike in *Hendricks* where evidence existed of his "nightmarish upbringing and mental problems"

which the attorney could have easily unearthed had he fulfilled his constitutional duty to investigate (*Hendricks*, 70 F.3d at 1043), here, not only are the particulars of Petitioner's upbringing inconclusively established, but Oliver did investigate the mitigation case.

Moreover, in further distinction from the facts of *Hendricks*, Oliver did *not* fail to put on a mitigation case. Working with what he had, he called police officer Charlie Johnson who testified that he had known Petitioner since 1969 through Petitioner's role as an informant for the Concord Police Department Narcotics Unit. TrRT 4038-4039. Johnson testified that Petitioner was still an informant and did a good job, that Petitioner was a volunteer, and that he had a connection with the security office of the Concord Naval Weapons Station as well. TrRT 4044-4046.

Oliver also called Tom Jennings, Petitioner's brother, who testified that Petitioner had placed marijuana in his pocket, alerted his police officer contacts, and that he, Tom, had subsequently been arrested for possession of marijuana and grand theft. Tom testified that he was in custody for five days as a result of this incident and that the experience had turned him around. TrRT 4078-4086.

Oliver called William Gagen, former deputy district attorney for Contra Costa County, who knew Petitioner in 1971 and 1972 when the latter was working as a police informant. Mr. Gagen prepared a letter intended to aid the Petitioner in getting employment which characterized Petitioner as reliable and conscientious. The witness felt that Petitioner was trustworthy. TrRT 4054-4062.

Oliver also called Carlos Rose, a police officer, who testified that Petitioner was his informant for narcotics investigations and that he kept a file on Petitioner containing documents and information relevant to his informant role. He testified that on a number of occasions he had described Petitioner as a reliable informant. Rose stated that Petitioner was an effective informant. TrRT 4001-4027; 4068-4071.

In *Hendricks*, although he knew of his client's difficult life, trial counsel did not conduct "any investigation directed at developing mitigating evidence" and did not put on any mitigation case other than to plead for mercy. *Id.* at 1043. Although the mitigation case presented here probably did little to rouse the jury's sympathy for Petitioner, the unavailability of beneficial evidence cannot be held against the attorney. *See Hendricks*, 70 F.3d at 1042. While several of Petitioner's witnesses before this court stated that they would have testified before the penalty jury to the effect that Petitioner was a good person and should be spared from execution (*see, e.g.,* Sapp, RT 128), opening the door to the question of Petitioner's character would have allowed the prosecution to put on its own evidence of his past anti-social behavior - to devastating effect.

The question of whether the failure to develop expert mental health testimony in the nature of that given in this proceeding was constitutionally ineffective is rendered moot by the extreme likelihood that the presentation of Petitioner as a sexual predator and methamphetamine addict (whatever the underlying causes of his deterioration into such a state) would have only reinforced the jury's death verdict. That the jury would instead have been moved to spare Petitioner's life because he was mentally impaired due to a cruel upbringing and an unfortunate fall into drug addition is a *possibility*, but only a remote one, not sufficient in this court's view to undermine confidence in the outcome.

Then, of course, the chances of success with this particular tactic are lessened even further by the probability that the prosecution would put on its own expert who would bring in the prior molestations, if they had not already come in through the defense, and would testify that the psychiatric evidence actually demonstrates that Petitioner had an anti-social personality disorder and not a mental illness. *See* Testimony of Michael Burt, RT 1324; 1357-58; 1376; *and see Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) *cert. denied,* 503 U.S. 910 (1992) (even where there is a strong basis for a mental defense, an attorney may reasonably forego that defense when the experts would be subject to

impeachment by equally persuasive opposing psychiatric testimony). The available methods of combating the effect of the bad act evidence (*see* RT 1325-1332) would not have diminished their negative impact sufficiently that the risks of this approach to the penalty phase would be outweighed by its benefits. There is simply no showing of the *probable* alteration of the outcome that *Strickland* requires.

Again, the fact remains, in any event, that even if this testimony might have resulted in the imposition of a different sentence, the failure to develop it is excused because Oliver made reasonable efforts to assess his client's mental health and was informed by his expert that there were no available issues to be raised in this area. Oliver asked Dr. Hjortsvang to see petitioner for a second interview prior to the penalty phase and again Dr. Hjortsvang reported that there were no signs of mental illness. Respondent's expert, Dr. Missett, has testified that, based upon the notes of his interviews with petitioner, Dr. Hjortsvang conducted a reasonable and professional evaluation. Other witnesses testified that Dr. Hjortsvang was well regarded in the county and was very experienced with the type of evaluation involved in this case. Neither Drs. Gudiksen or Rosenberg impugned Dr. Hjortsvang's professional abilities.

Dr. Hjortsvang knew of Petitioner's juvenile record and commitment to the Boy's Ranch and the molestations of young girls which put him there. Resp. Exh. BB. He knew that Petitioner was using methamphetamine heavily in the years and days prior to the murder. *Id.* Petitioner's complaint that Dr. Hjortsvang could not have formed an adequate opinion of his mental health in the absence of the social history uncovered by habeas counsel presupposes that this history has been clearly established in these proceedings.

The only other evidence considered "critical" by Petitioner's habeas experts which was not possessed by Dr. Hjortsvang was the family medical history and various incidents from Petitioner's own medical history. Petitioner has not satisfied this court by a preponderance of evidence that these items have any bearing on his own mental condition. Drs. Gudiksen and Rosenberg testified at length about the maladies of

Petitioner's ancestral relatives and about Petitioner's own early ailments such as skin rashes as an infant and his propensity to hurt himself. Although this history was considered noteworthy by the Petitioner's doctors, how it contributed to or caused his alleged mental illness was not adequately explained. Dr. Missett, testified on the other hand that it could not have. RT 1622; 1773-1776. Evidence that Petitioner used to mutilate himself and introduce foreign substances into his wounds is present and is conceded by Dr. Missett (RT 1783-1788), but the lack of this knowledge alone could not wholly subvert the validity of Dr. Hjortsvang's opinion.

An attorney is entitled to rely on his experts. *Hendricks*, 70 F.3d at 1038-1039; *Babbit v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) *cert. denied* 119 S.Ct. 1068 (1999). The court finds that Oliver did not act unreasonably in concluding that there was no mental health evidence to present at sentencing.

Petitioner has placed great stock in the power of Orin Allen's testimony. The court feels that his testimony was not relevant in any significant respect but believes it should be addressed briefly because of the way it has been characterized by Petitioner through his counsel. Orin Allen did appear through live testimony to be a man of great compassion and influence. He did remember Petitioner with some warmth but when queried if he would have cooperated with the defense if asked, he stated:

> "Only in that I feel today as I would have felt then, and with a lot of our cases now, where did that parent or us as an institution miss the boat with that particular person or youngster to get him where he was right then."

RT 304-305. Mr. Allen clearly felt that the system failed Petitioner and that if greater efforts had been made to intervene in his life that things might not have reached the point that they did. This was the gist of the testimony. Mr. Allen did not state that he believed that Petitioner could not have committed the crime or that he should not have been convicted

and sentenced to death for it. Moreover, although Petitioner makes much of Mr. Allen's standing in the community, his recognition by many groups for his commendable work with troubled youth, and the fact that the Byron Boys' Ranch has not been renamed in his honor, these facts did not exist in 1983. The court finds that Mr. Allen's testimony would not have been "overwhelmingly helpful" and in fact may have hurt Petitioner by implying that the chance to rehabilitate him had been missed. Therefore, Oliver's failure to call him to testify at the penalty phase was not prejudicial.

Oliver may indeed have erred in concluding that he could not look at the medical records that had been sent to the special master, but this error was harmless because, as discussed above, those records contained little that would have altered the scope of his investigation or his view of petitioner's mental health.

Finally, the court is compelled to address the contention, made both implicitly and explicitly in these proceedings, that trial counsel must have been ineffective simply because he did not uncover the mass of background evidence or obtain the detailed medical opinions that habeas counsel has been able to garner. From time to time throughout the evidentiary hearing before this court witnesses were asked to compare the quantum of evidence presented by trial counsel to that marshaled by habeas counsel in support of the instant application. This is not an apt comparison, however. Habeas counsel had in excess of seven years to prepare their case and were sufficiently funded to pursue every possible avenue which they believed might benefit their client. The trial of this matter occurred seventeen years ago under entirely different time and funding constraints. Nevertheless, trial counsel had the benefit of the medical opinion of a qualified physician. That the physician was originally engaged by predecessor counsel is irrelevant. There is no evidence that anything, including a request from the examining physician expert, occurred which would have or should have prompted the conduct of an investigation such as the one conducted by habeas counsel. Counsel's conduct is not to be judged on the basis of what habeas counsel have done, but rather on the basis of what a reasonable attorney

could have done in the circumstances. *Waters v. Thomas*, 46 F.3d at 1512.

The point that, despite all the time and money that habeas counsel were able to devote to this Petition, the evidence that was unearthed was not so overwhelmingly beneficial to Petitioner that it would have been clear error not to have presented it to a penalty jury, is worth re-emphasizing here. Even if Oliver had possessed the exact same evidence and had obtained the exact opinions that Drs. Rosenberg and Gudiksen have offered here, it would have been entirely reasonable and within professional norms to have decided that it was too risky to put this evidence before the jury. Although he could have confined himself to a presentation of Petitioner's harsh upbringing without comment by mental health experts, in an effort merely to humanize Petitioner and to gain the jury's sympathy, this evidence alone is not reasonably likely to have altered the outcome. In other words, even if counsel was deficient in failing to investigate, the deficient performance did not prejudice the defense. *See Strickland*, 466 U.S. at 687.

The court finds that trial counsel was not ineffective in his handling of the penalty phase of Petitioner's case. This aspect of Claim 4 must also be denied.

CONCLUSION

The remaining claims of the Petition for Writ of Habeas Corpus are denied. Judgment is hereby entered on behalf of Respondent and the petition is dismissed.

IT IS SO ORDERED.

DATED: 2 16 00

/s/
William A. Ingram
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

People *v.* Jennings (1988) 46 Cal.3d 963, 760 P.2d 475; 251 Cal. Rptr. 278
[No. S004612, Crim. No. 23625. Supreme Court of California. Sept. 19, 1988.]

THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL WAYNE JENNINGS, Defendant and Appellant.

COUNSEL

Frank O. Bell, Jr., State Public Defender, under appointment by the Supreme Court, and Musawwir Spiegel, Deputy State Public Defender, for Defendant and Appellant.
John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Edward P. O'Brien, Assistant Attorney General, Herbert F. Wilkinson and Gerald A. Engler, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

EAGLESON, J.—Defendant was convicted by a jury in the Contra Costa County Superior Court of first degree murder (Pen. Code, § 189)[13] (count I); forcible rape (§ 261, subd. (2)) (count II); first degree burglary (§§ 459-460) (count III); and robbery (§ 211) (count IV). He was found to have personally used a knife during the commission of each of these crimes (§ 12022, subd. (b)), all of which occurred on August 8, 1982, and involved the same victim, Violet Ann Newman. The jury found true special circumstance allegations that defendant intentionally committed the murder during the commission or attempted commission of the rape,

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13. All statutory references are to the Penal Code unless otherwise indicated.

residential burglary, and robbery. (§ 190.2, subd. (a)(17)(i), (iii) and (vii).) The jury fixed the penalty for the murder as death. After denying modification of the verdict (§ 190.4), the court imposed that penalty. This appeal is automatic. (§ 1239, subd. (b).)

Defendant seeks reversal of the verdicts of guilt on grounds that the trial court erred in admitting evidence of his pretrial statements which he claims were obtained by interrogating officers in violation of his right against self-incrimination after he had invoked his right to remain silent. (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]; *People v. Fioritto* (1968) 68 Cal.2d 714 [68 Cal.Rptr. 817, 441 P.2d 625].) Defendant also challenges the penalty proceedings on a variety of grounds most of which are related to the propriety of the court's instructions to the jury.

After an independent review of the videotaped interrogation of defendant we conclude that the trial judge, who also reviewed the tape, could reasonably believe that defendant had not invoked his right to silence, and we find nothing in that tape to persuade us otherwise. Admission of defendant's statement was not error, therefore. Finding no error prejudicial to defendant during the penalty phase of the trial, we shall affirm the judgment in its entirety.

I.

Violet Newman, the 63-year-old victim, died of multiple traumatic injuries she suffered in her Concord home at approximately midnight on Saturday, August 7, 1982. An autopsy revealed 14 stab wounds in her chest and abdomen, and a deep laceration across her neck that severed the left carotid artery and the jugular vein. A possible ligature mark encircled her neck. Marks on the ankles were consistent with those that a rope tied around the ankles would make. There were bruises and abrasions on the victim's face and neck. She had been raped in a manner that caused abrasions in the vaginal wall. Bruises on the inside of her right thigh could have been made by a knee. Semen found just above the pubic hairline was aspermatic, and contained A and H blood-type

antigens. Newman's body was found in her bedroom, on the bed, on Monday, August 9, by her brother-in-law who had been contacted by her employer when she failed to arrive at work on Sunday. She was unclothed except for a night hat and gloves. Her legs were spread wide apart. Her purse lay open at the foot of the bed. Her wallet and checkbook were missing, as was a telephone answering machine that she had kept in the living room.

Defendant was connected to the homicide only by circumstantial evidence. That evidence, however, was strong. His parents, with whom he had lived until six weeks before the killing, were immediate neighbors of the victim. He had grown up with the victim's children. Defendant continued to visit frequently with his parents. A layered piece of strapping tape found in the victim's bed bore defendant's thumbprint and partial left palm print. Tape of the same size and type was found in the camper shell of defendant's pickup truck which was seized and impounded on August 12. Rope found in the truck was microscopically examined and determined to be made identically to a piece six inches long that had been found on the floor next to the victim's bed. This rope was the width of the ligature mark.

Microscopic examination of a piece of broken plastic found in defendant's truck established that it had come from an answering machine of the same make as that missing from the victim's house. Blood on the piece of plastic contained the AK type 2-1 enzyme as did the victim's blood. Defendant's blood type, A, contained AK type 1 enzyme. Moreover, his blood possessed A and H antigens like those in the aspermatic semen found on the body. Defendant was determined to be a secreter whose blood-type substances were present in his semen. He had undergone a successful vasectomy in 1976.

Boot prints on the victim's sheet were sufficiently similar to those made by the boots worn by defendant at the time of his August 12 arrest to have been made by those boots. A telephone call had been attempted from the victim's telephone at 2:19 a.m. on August 8 to the home of Ms. B., a friend of defendant with whom he had lived in 1981. She did not

know the victim. Defendant had also attempted to reach her earlier during the night of August 7, when he telephoned from a bachelor party he was attending in Pittsburg. Although defendant had left the party to purchase beer and had returned without any money, he had $10 to $15 in currency and some change the next morning at 8 a.m. when he again returned to the house where the party had been held.

At 9 a.m. on August 8, defendant visited other friends who noticed that his hair was wet. He told them he had taken a whirlpool bath. The victim had a whirlpool machine. Although she habitually hung her towels on the bathroom towel racks, after the murder one was found thrown over the shower door. Defendant was in possession of a folding pocket knife at the August 7 party, but the next afternoon stated that he had lost the knife. The blade on the knife was about three and one-half to four inches in length, consistent with the stab wounds suffered by the victim. Defendant told several persons that he had not left the August 7 bachelor party until Sunday morning. He had told an investigating officer that he had been at the party from 1:45 p.m on Saturday until 4:30 a.m. on Sunday. He later stated that he had left for two 15-minute periods before 11 p.m. Saturday to purchase drugs. Still later he told another officer that he had left the party at 11 p.m. to drive his brother home, after which he had returned to the party where he remained until 1 or 1:30 a.m. Sunday when he went to the home of another friend where he remained until 6:30 a.m. Sunday, at which time he returned to the house where the party had been given. The house in which the party had been held was seven to fifteen miles from the home of the victim dependent upon the route taken. Travel time between locations was 13 to 20 minutes.

No witness testified that petitioner had remained at the party all night. The testimony of those witnesses who had been at the party conflicted as to the time he had been absent, but all agreed that he had left the party several times.

After the victim's body was discovered, defendant made statements to acquaintances that referred to details that were not publicly known.

On the night of August 10 he said that his neighbor had been tied up, stabbed numerous times, and it appeared an attempt had been made to cut her head off. He claimed he had been shown pictures of the body by the police, but the first photos had not been developed at the time he had been present during a police interview. On the same day, during an interview of defendant's parents by a police officer, defendant said that he could not see how anyone would rape such a nice old lady. He volunteered statements about the rape when interviewed at the police station on August 12. No information about the rape, the slashed throat, or that the victim had been tied had been released to the public.

The defense was alibi, coupled with an effort to suggest that another person who had been seen in or near a station wagon in the neighborhood on several occasions when a series of burglaries occurred, and who was in front of the victim's house on Monday, August 9, had committed the offenses.

II.

Guilt Phase

Defendant's first claim, made in a brief filed before the decision of the United States Supreme Court in *Lockhart v. McCree* (1986) 476 U.S. 162 [90 L.Ed.2d 137, 106 S.Ct. 1758], is that trial by a "death-qualified" jury (*Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]) denied him both the right to be tried by a jury representing a fair cross-section of the community and the right to trial by an impartial jury. Both arguments were rejected by the Supreme Court in *Lockhart* as they had been earlier by this court in *People v. Fields* (1983) 35 Cal.3d 329 [197 Cal.Rptr. 803, 673 P.2d 680], and *Hovey v. Superior Court* (1980) 28 Cal.3d 1 [168 Cal.Rptr. 128, 616 P.2d 1301]. (See also *People v. Chavez* (1985) 39 Cal.3d 823, 827 [218 Cal.Rptr. 49, 705 P.2d 372]; *People v. Anderson* (1985) 38 Cal.3d 58, 60 [210 Cal.Rptr. 777, 694 P.2d 1149]; *People v. Zimmerman* (1984) 36 Cal.3d 154, 161 [202 Cal.Rptr. 826, 680 P.2d 776].) These arguments need not be addressed further. (*People v. Melton* (1988) 44 Cal.3d 713, 732 [244 Cal.Rptr.

867, 750 P.2d 741]; *People v. Miranda* (1987) 44 Cal.3d 57, 78-79 [241 Cal.Rptr. 594, 744 P.2d 1127].)

Defendant next argues that the trial court erred in denying in part his motion to exclude statements he made to investigating police officers on August 12, 1982, after he had, assertedly, invoked his right against self-incrimination. (*Miranda v. Arizona, supra*, 384 U.S. 436; *People v. Fioritto, supra*, 68 Cal.2d 714.)

Because the trial court apparently considered the motion as one directed to exclusion of defendant's statements on *Miranda* grounds, we review that court's determination that the statements were admissible on that basis. We note, however, that while the motion was one to suppress photos, videotapes, and recordings made by police investigators after defendant had invoked his *Miranda* rights, it was expressly described by defense counsel as "a 1538.5 motion";[14/] was made as a pretrial in limine motion; and defendant made no objection when testimony regarding defendant's recorded statements was offered at trial. Notwithstanding the use of these improper procedures by which to raise and preserve the issue,[15/] we reach the merits of defendant's claim because the parties

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14. Because the videotapes or recordings of defendant's statements are themselves evidence of the statements, as opposed to evidence obtained as a product of the statements, they were not tangible evidence subject to exclusion pursuant to a pretrial motion to suppress under section 1538.5. The reasoning by which defendant claimed that photographs taken of him were the product of his statements was not made clear in the motion. It appears that none of the evidence was properly subject to suppression under section 1538.5 since defendant did not claim it was the product of an unlawful arrest.

15. Generally when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal. (See *People v. De Santiago*

stipulated that the pretrial ruling would be binding at trial,[16] and the

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(1969) 71 Cal.2d 18, 22 [76 Cal.Rptr. 809, 453 P.2d 353]; *People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 734 [125 Cal.Rptr. 798, 542 P.2d 1390]; *Saidi-Tabatabai v. Superior Court* (1967) 253 Cal.App.2d 257, 266 [61 Cal.Rptr. 510]; *People v. Beasley* (1967) 250 Cal.App.2d 71, 77 [58 Cal.Rptr. 485]; 3 Witkin, Cal. Evidence (3d ed. 1986) § 2011, p. 1971.) The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility. When the parties stipulate on the record, as they did here, that a ruling on an in limine motion to exclude evidence will be binding, that stipulation should be deemed a continuing objection to admission. Failure to renew the objection when the evidence is offered does not waive the right to assert error on appeal in these circumstances. Defendant's failure to object at trial to the admission of his statement does not preclude consideration of his assertion of error here.

16. We accept the parties' characterization of their pretrial agreement as a "stipulation." Shortly before testimony of the interrogating police officer was to be offered at trial, counsel advised the judge that they had agreed or they "understood" that the earlier ruling, by a different judge, would be binding at trial. The record is ambiguous as to whether counsel reached this agreement on the basis of their mistaken understanding that because the ruling on the section 1538.5 motion necessarily involved a determination of whether there had been a *Miranda* waiver, that finding was "res judicata," or they simply agreed to be bound by the pretrial ruling.

At trial defense counsel asserted that he and the prosecutor believed that the pretrial ruling was a "res judicata decision or collateral estoppel decision." The trial judge said

judge to whom the matter was submitted by finding the statements to be "voluntary" indicated that he had considered the motion to suppress as one directed to introduction of any evidence of the statement as having been obtained in violation of *Miranda*.

There was no actual hearing on the motion which was simply submitted on a brief written motion, opposition papers, and videotapes of the interrogation. No other evidence, and no argument, was offered on whether defendant was in custody. The court's only express finding in the minute order denying the motion in part was that defendant's statement was "voluntary."

The rule of *Miranda* is well established: "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such

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that he understood that "in effect the parties had ended up agreeing that the [pretrial] ruling would be the ruling of the Superior Court and would not seek relief from me ... it made finding of voluntariness beyond a reasonable doubt and to a moral certainty in accordance with the law." The prosecutor then stated: "I agree with counsel's characterization of the agreement that the decision [pretrial] would be binding on the parties here."

opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (384 U.S. at pp. 478-479 [16 L.Ed.2d at p. 726].)

In *People v. Fioritto, supra,* 68 Cal.2d 714, we recognized that once a defendant has indicated an intent to assert his right to remain silent or to counsel, all further attempts at police interrogation should cease. We also emphasized, however, that statements voluntarily initiated by a suspect are admissible, and that police officers have no obligation to dissuade an individual who comes to the police to confess or make a statement. (*Id.*, at p. 719.) Although he does not make the nature of his argument explicit, defendant appears to be contending that he was in custody at the time his statements were made, and that his invocation of his rights during questioning was not honored by the police. The motion had asserted generally that once a defendant has invoked his Fifth Amendment privilege, statements obtained through further police interrogation are inadmissible, and statements are unlawfully seized if taken in violation of *Miranda*, or if involuntary. Defendant made no factual allegations in his motion or memorandum of points and authorities regarding the circumstances in which his statements were obtained. However, in relying on *Miranda*, the motion implicitly claimed that the threshold for invocation of the protections of that decision had been reached, i.e., that defendant was both in custody and undergoing custodial interrogation when the statements were made.

Defendant claims that he invoked his rights during an August 12 interrogation when he stated to Officer Cromwell: "I'll tell you something right now. You're scaring the living shit out of me. I'm not going to talk. You have got the shit scared out of me," and, "I'm not saying shit to you no more, man. You, nothing personal man, but I don't

like you. You're scaring the living shit out of me... That's it. I shut up."[17/]

The ruling of the trial court that statements made by defendant after he made this pronouncement were "voluntary" implies that the court found either: (1) that defendant was not in custody at the time his statements were made; or,[18/] (2) that he had not attempted to terminate the interview by invoking his rights; or, (3) that his subsequent statements were not induced by impermissible attempts at further

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17. The motion to suppress was granted as to statements defendant made on the next day, August 13, during the last five minutes of a taped interrogation after he had stated to Officer Maich: "This is getting us nowhere. I don't want to talk no more, Don." He was then addressing Officer Don Maich, whom he had known for 10 to 15 years. Maich had not been the primary interrogator, however. Officer Gordon Cromwell, whom defendant had not known prior to the interrogation, had conducted both sessions.

18. Defendant argues that because the People did not dispute whether he was in custody at the time the suppression motion was submitted for decision, they may not do so now. Although defendant remained at the police station for approximately seven hours, during much of which he was questioned, several factors suggest that he was not in actual custody and the circumstances were not such that a person would reasonably believe he was under restraint equivalent to arrest. He had voluntarily accompanied an officer he knew to the police station. He was left alone in the interview room for lengthy periods of time. He stated on one occasion that he would leave. He suggested to the officers that they go out and confirm his alibi instead of questioning him further. He appeared to be relaxed and his attitude was that of a person who both recognized the reason the police needed to talk to him and wanted to assist them in the investigation.

interrogation after defendant had indicated his desire to terminate the interview.

Because we conclude that defendant did not invoke his right to silence by the remark to Officer Cromwell, we need not decide whether the custody question was raised by the motion or how it should be resolved.

Assuming that the trial court found or assumed that defendant was in custody when he made the statements in question, we agree with the trial court's implicit finding that defendant did not intend to invoke his right against self-incrimination. Were we to base our decision solely on the reporter's transcript of those portions of the interview on which appellant relies, his claim that he invoked his right to silence would appear meritorious. On a review of the full tape and consideration in context of the words on which defendant relies a different picture emerges. That part of the first interview at which defendant claims he asserted his rights involved a few moments when defendant lost his temper and expressed anger toward Officer Cromwell who was then questioning him about his whereabouts on the Monday following the murder. Officer Cromwell had indicated that there were discrepancies, and time unaccounted for. Defendant had apologized, stated that he did not remember that day well, and that the friends and relatives with whom he had spent parts of the day could account for his time. When the officer persisted in his attempt to clarify certain contradictory statements defendant had made, defendant became angry, said "this thing" [referring to the murder] and the investigation had him scared, and he was not going to say any more. Maich was present at the time.

Defendant had earlier indicated that he trusted Officer Maich, whom he had known for many years, and Officer Rose, for whom he had been a narcotics informant, not to misstate or twist what defendant said, and was talking to Cromwell only because Rose assured him Cromwell could be trusted to be fair. When defendant made the statements he claims were an invocation of his rights he was addressing Cromwell. Viewing the tape, observing defendant's demeanor before, during, and

after the statements, and considering the context in which defendant made the statements on which he relies here, we conclude that the statements reflect only momentary frustration and animosity toward Cromwell. It is evident that defendant believed Cromwell was misconstruing defendant's statements and persisting in his attempt to get defendant to recall details about his whereabouts on Monday that he had already admitted he could not recall instead of doing as defendant had earlier suggested — going out and questioning those people who could account for his whereabouts on that day.

The court below, viewing this tape, could reasonably conclude that defendant was refusing to talk further with Cromwell whom he did not like or trust, as opposed to Maich or Rose, and that he was not invoking his right against self-incrimination when he made these statements. While we must review the record and make an independent determination of the question, we, like the United States Supreme Court, may "give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence. (See *Miller v. Fenton* (1985) 474 U.S. 104, 112 [88 L.Ed.2d 405, 412, 106 S.Ct. 445].) Having viewed the videotaped interrogation of defendant, and observed his interaction with the officers, we, too, conclude that his further statements were voluntary. Defendant did not, by those statements, indicate that he was invoking his right to silence. He apologized for his outburst and voluntarily continued the interview. The trial court did not err, therefore, in admitting the statements. (*People v. Davis* (1981) 29 Cal.3d 814, 824 [176 Cal.Rptr. 521, 633 P.2d 186].)

III.

Special Circumstances Claims

Defendant's only claim of error in the trial of the special circumstances allegations lies in the failure of the court to instruct the jury that a felony-murder special circumstance under section 190.2, subdivision (a)(17), requires not only a finding of intent to kill as this court concluded in *Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197

Cal.Rptr. 79, 672 P.2d 862], but also a finding that this intent must be premeditated and a product of deliberation.

This claim is based on reasoning that *Carlos* was correctly decided, and that from *Carlos* it follows that if the culpability necessary to justify imposition of the death penalty requires that the murder be intentional, it must also meet the other requisites of first degree murder, i.e., premeditation and deliberation. (See § 189.) Inasmuch as we have reconsidered *Carlos* and concluded that it was not correctly decided, the predicate assumption for this argument fails. A felony-murder special circumstance is established even absent intent to kill, premeditation, or deliberation, if there is proof beyond a reasonable doubt that the defendant personally killed the victim in the commission or attempted commission of, and in furtherance of, one of the felonies enumerated in subdivision (a)(17) of section 190.2. (*People v. Miranda, supra*, 44 Cal.3d 57, 89; *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1139 [240 Cal.Rptr. 585, 742 P.2d 1306].)

IV.

Other than the evidence offered at the guilt phase, the only penalty phase aggravating evidence presented by the People was the testimony of the sister of defendant's former wife regarding his commission of acts of sexual misconduct in 1971, at a time when she was 13 years old. That evidence is discussed in greater detail below.

Defendant offered evidence, primarily through the testimony of law enforcement officers with whom or for whom he had "worked," regarding his assistance to those officers as a volunteer informant. Defendant had supplied information regarding narcotics transactions, burglaries, and other crimes, and had assisted in "controlled buys" of narcotics, and illegal or stolen firearms. Defendant's brother also testified regarding an incident in which he had been arrested by officers who came to the house and found in his pocket some marijuana that defendant had given him earlier in the day. That conviction and probation had "changed his life."

Penalty Phase Contentions

A. Aggravating Factors.

The only aggravating factor, apart from those established by evidence introduced at the guilt phase of the trial, which the People sought to establish at the penalty phase of the trial, was that described in factor (b) of section 190.3: "The presence ... of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." To prove past conduct of this nature by defendant, the People introduced evidence of incidents in 1971 when defendant engaged in acts of unlawful sexual conduct, oral copulation, and lewd conduct with his 13-year-old sister-in-law. He contends now that consideration of criminal conduct of which the defendant has not been convicted denies due process and permits imposition of cruel and unusual punishment. He also challenges admission of this evidence on the ground that the statute of limitations for prosecution of those crimes had run, and complains of error in instructing the jury on "rape."

1. Unitary jury.

Defendant's first argument is based on an assertion that a jury that had convicted a defendant of first degree murder with special circumstances is incapable of reaching an objective, unbiased decision on the question of whether the other crimes have been proven beyond a reasonable doubt. The essence of the claim, therefore, is not that consideration of other-crimes evidence is constitutionally impermissible, but that a capital defendant is entitled to have the penalty decision made by a second jury. We gave careful consideration to such a claim and to the due process implications of having a unitary jury in *People v. Balderas* (1985) 41 Cal.3d 144, 204-205 [222 Cal.Rptr. 184, 711 P.2d 480], where we concluded that the procedure is constitutionally permissible, and rejected the suggestion that the evidence was inadmissible per se. Nothing in the instant case persuades us that the issue should be reconsidered.

2. Statute of limitations.

We also reject defendant's argument that because the statute of limitations barred prosecution for defendant's other crimes, the conduct may not be considered an aggravating factor rejected under an earlier death penalty law in *People v. Terry* (1969) 70 Cal.2d 410, 422 [77 Cal.Rptr. 460, 454 P.2d 36]. There the claim was made with regard to evidence of a robbery for which prosecution was barred at the time the murder charge was filed. We rejected the claim, noting that section 800 which established a three-year period of limitation for initiating robbery prosecutions "does not prohibit the introduction of evidence of prior criminal acts for which prosecution would be barred by the statute of limitations. Such evidence is not introduced in order to impose a penalty for those prior acts, but rather as evidence 'of the circumstances surrounding the crime [of murder], of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty [for murder]' as authorized by Penal Code section 190.1. The fact that the prosecution for the robbery may have been barred by the statute of limitations is immaterial here."

Determination of the appropriate penalty for murder with special circumstances under the 1978 death penalty law involves consideration of factors similar to those to which we referred in *Terry, supra*, 70 Cal.2d 410 — the circumstances of the murder and of the defendant's background and history, the statutorily designated aggravating factors, and any mitigating evidence relevant to the determination offered by the defendant. (§ 190.3; *People v. Rodriguez* (1986) 42 Cal.3d 730, 786-787 [230 Cal.Rptr. 667, 726 P.2d 113]; *People v. Easley* (1983) 34 Cal.3d 858, 876 [196 Cal.Rptr. 309, 671 P.2d 813].)

Nothing in the language of the 1978 death penalty law indicates an intent to depart from the prior law by barring evidence of prior criminal conduct which took place outside the limitations period. The only statutory restriction on introduction of evidence of other criminal activity for consideration as an aggravating factor is that the conduct must have involved the express or implied threat to use force or violence; the

evidence must not be admitted if the defendant has been acquitted of the offense; and except when introduced for rebuttal the defendant must have advance notice of the evidence to be introduced. (§ 190.3.) As this court noted in *People v. Balderas, supra*, 41 Cal.3d 144, 205, footnote 32, the purpose of the "penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes. Prior violent criminality is obviously relevant in this regard....."

Evidence of a defendant's past criminal conduct may be essential to give the jury a true picture of the defendant's history since there is no temporal limitation on evidence in mitigation offered by the defendant. In addition, evidence of past, uncharged criminal conduct may reveal a pattern of continuous criminal activity or one of criminal activity of escalating seriousness by a defendant. Since this is highly relevant to the penalty decision, we are satisfied that section 190.3 does not contemplate limitation of such evidence to crimes for which prosecution is not barred by the applicable statute of limitations.

We have recently reached a similar conclusion in rejecting a claim that a time-barred felony may not form the predicate for a felony-murder special circumstance under sections 190.2, subdivision (a)(17), and 190.4. (*People v. Morris* (1988) 46 Cal.3d 1, 15 [249 Cal.Rptr. 119, 756 P.2d 843].) A fortiori there is no bar to consideration of earlier felonious conduct involving force or the threat of force as an aggravating factor.

3. Instructions on prior forcible criminal activity.

Defendant next contends that permitting the jury to consider his conduct with the child as an aggravating factor under section 190.3, factor (b), was error both because the evidence that the victim submitted to force or a threat of force was insufficient, and because the court erroneously instructed the jury under a statutory definition of rape enacted subsequent to his act, one which did not require a finding that the victim resisted or was prevented from resisting by threats of immediate harm. We conclude that the evidence was sufficient, and that

defendant was not prejudiced by the court's error in identifying the conduct as rape and defining rape under an inapplicable statutory amendment of section 261.

a. Evidence of force or violence.

The witness testified that she did not call for help when defendant assaulted her while she was visiting in his home because she did not want to awaken her sister and because she was "scared." She also testified, however, that she was five feet two and weighed one hundred pounds, defendant was six feet tall and weighed one hundred seventy pounds, and that he lay down on the couch next to her, placed her on her back, and then lay on top of her to accomplish the act.

The evidence was clearly sufficient to establish the use of force by defendant. The child did not submit. He turned her onto her back and lay on top of her. *People v. Peckham* (1965) 232 Cal.App.2d 163 [42 Cal.Rptr. 673], upheld a conviction for assault with intent to commit rape (§ 220) where the defendant, who was "very heavy," took the victim by the arm, put her on a table, and lay on her. Rejecting a contention that the evidence did not support the requirement of "force," the Court of Appeal explained: "[T]he 'force' requisite to sustain the conviction does not mean bodily harm but the physical power required in the circumstances to overcome [the victim's] resistance." (232 Cal.App.2d at p. 168.)[19] In addition, were there any question as to whether

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19. Defendant's claim that the court erred in permitting the jury to consider the conduct underlying the allegation of lewd conduct because that conduct was not shown to involve the use of force fails for a similar reason. That incident occurred on the morning following the "rape" when the defendant committed other acts of sexual abuse on the same victim. The element of force was established by her testimony that defendant approached her from the back as she was working at the kitchen sink and "pushed himself against my

defendant accomplished the act by means of force, other uncontradicted evidence established submission under threat of force. In statements made to her mother and sisters after the rape, the victim said that defendant had threatened to kill or hurt her if she moved. These statements were admitted to rebut a claim of recent fabrication and thus could be considered by the jury for their truth. (Evid. Code, § 1236; *California v. Green* (1970) 399 U.S. 149 [26 L.Ed.2d 489, 90 S.Ct. 1930]; *People v. Cannady* (1972) 8 Cal.3d 379, 387-388 [105 Cal.Rptr. 129, 503 P.2d 585].) Although defendant contends Evidence Code section 1236, which permits the admission of prior consistent statements under certain circumstances, is inapplicable because the victim's statements to her mother and sister were inconsistent with her previous statements, he failed to make that specific objection and thus waived the issue for appeal. (See *Cannady, supra*, at p. 387.)

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buttocks, and I could feel his erection." This contact was unquestionably forcible. The victim did not consent and had no opportunity to avoid the contact which was made by pushing against her. The absence of force in defendant's subsequent acts of fondling and rubbing the victim is irrelevant since the initial contact was itself a violation of section 288 and was committed forcibly.

The third incident, a violation of section 288a, involved the same victim. It occurred on August 9, 1971, in defendant's vehicle. Defendant told the child to get into the back seat. She did not obey and told him he was scaring her. He then unzipped his trousers, and pushed her head down onto his erect penis. She testified that she was unable to do anything because defendant held his hand on the back of her head. Defendant does not argue that the evidence does not support a finding that he used force in the commission of this offense.

b. Instructions.

There is merit in defendant's claim that the court erred in instructing the jury on forcible rape as defined in section 261. This sexual assault occurred on July 24, 1971. At that time, section 261 defined forcible rape as that occurring where the victim "resists, but her resistance is overcome by force or violence," or where the victim "is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power or execution...." The court instructed the jury under a subsequent amendment of the statute that rape could be established if it was "accomplished against the will of such person by means of fear of immediate and unlawful injury" to the victim, and that accomplishment of the act "by means of force or ... by means of fear of immediate and unlawful bodily injury to such person...." Resistance by the victim is not an element of the offense under the amended statute.

Had defendant been charged, convicted, and punished under the amended statute without instructions to the jury that resistance or prevention of resistance was an element of the offense of rape, the prohibition against ex post facto laws found in article I, section 9 of the California Constitution, and article I, section 9, and the Fourteenth Amendment of the United States Constitution would be violated. Each prohibits retroactive application to a criminal defendant of a statute or statutory amendment which enlarges the elements of an offense — making criminal conduct that was encompassed within the statutory definition of the offense at the time of the defendant's conduct, lessens the People's burden of proof, or increases the penalty over that in effect at the time of the crime. (See *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 180 [167 Cal.Rptr. 854, 616 P.2d 836]; *People v. Benefield* (1977) 67 Cal.App.3d 51 [136 Cal.Rptr. 465]; *DeWoody v. Superior Court* (1970) 8 Cal.App.3d 52, 56 [87 Cal.Rptr. 210].) No constitutionally impermissible application of the law occurred here, however.

Defendant's focus on the court's instruction and reference to the conduct as "rape," overlooks the distinction between the clearly impermissible ex post facto application of a penal statute under which a defendant is convicted or punished, and the nature of the aggravating factor established by section 190.3. That factor does not limit consideration of prior criminal conduct to offenses in which force or assaultive conduct is an element of the offense. Proof that defendant committed forcible rape was not required. Factor (b) of section 190.3 permits consideration of any "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." In 1971, when the sexual assault occurred, section 261.5 defined "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Prior to a 1970 amendment of section 261, this offense had been included in that section's definition of "rape." Although renamed in the amendment, the conduct was no less criminal when defendant assaulted his sister-in-law. The question then, under section 190.3, is not what the elements of rape were in 1971, but whether the instructions required that the jury find that defendant engaged in criminal activity accomplished by means of force or the threat of force. (See *People v. Balderas, supra*, 41 Cal.3d 144, 200-201; *People v. Boyd* (1985) 38 Cal.3d 762, 776-777 [215 Cal.Rptr. 1, 700 P.2d 782].)

Although the instructions given improperly identified the relevant conduct as "rape," they did require that the jury find all of the elements of the crime of unlawful sexual intercourse, and to find that it was accomplished by means of force or threats of force.[20/] Section 190.3

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20. The instructions advised the jury: "Evidence has been introduced in the guilt and penalty phases of this trial that may show that the defendant engaged in criminal activity which you may not consider as a factor in aggravation. *You may consider only the crimes which I will define for you in determining whether or not the defendant has engaged in*

requires no more.

Defendant also argues that the jury may have been misled by the court's instruction that if they found defendant had committed the sexual offenses, the conduct could be considered aggravating. He suggests that this instruction permitted nonforceable conduct to be considered. We disagree. The jury was instructed that to be considered aggravating the other criminal conduct had to involve the use or attempted use of force or a threat to use force. That instruction encompassed each of the crimes which the court defined. Not only do we find no tendency to mislead in the instructions, to which counsel had agreed, but in light of the uncontradicted evidence that each of the three offenses had been committed forcibly, we are satisfied that any possible tendency to mislead could not have been prejudicial.[21/]

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criminal activity which involves the use of or the express or implied threat to use force or violence." (Italics added.) Rape, lewd conduct with a child under 14, and oral copulation were defined.

The judge then expressly advised the jury that it might not consider evidence that had been received regarding defendant's involvement with illegal drugs. Defendant reasons that this instruction directed the jury that it had to consider the rape, lewd conduct and oral copulation aggravating if it found that defendant had committed the crimes, even if there was no force or threat of force.

21. The People argue that any error in this regard should be considered invited error (see *People v. Wickersham* (1982) 32 Cal.3d 307, 330 [185 Cal.Rptr. 436, 650 P.2d 311]), or found to have been waived because defense counsel and the prosecutor agreed between themselves on the instructions to be given. Defendant's counsel said to the court at the time the agreement was announced: "Your Honor, I do not have any objections to the death penalty instructions as they are now worded. As a matter of fact, I will say for the record that I am confident that the present wording of the instructions is a far

4. Notice of aggravating-factors evidence.

Finally, with respect to the evidence of aggravating factors, defendant contends that the court erred in permitting the mother of the child whom he had abused to testify because she was not named among the witnesses identified in the prosecutor's pretrial notice. That notice must be given pursuant to section 190.3, which provides in pertinent part: "Except for evidence in proof of the offense or special

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better state of affairs for the defendant's presentation of argument in this case than the CALJIC instructions from which they were worked up and, therefore, I am presently of the opinion that they are the most favorable set of instructions to the defense that can conceivably be justified by the present state of California law." It appears, however, that counsel had first expressed his continued objection to consideration of the evidence of the sexual offenses as an aggravating factor.

With regard to the other-crimes instructions specifically, counsel stated: "[T]he present 'other crimes instructions' as now set forth are substantially those as proposed by the defendant and are completely acceptable at this time to the defendant...."

However, we find defendant waived his further claim that he was entitled to have his jury instructed that before considering the evidence of the 1971 sex crimes, it must find the victim submitted as a result of the implied threat of force or violence. Even assuming arguendo that such subjective knowledge is legally required, the normal rule is that "a defendant's failure to request instruction on the elements of the other-crimes aggravating evidence will preclude him from raising the issue on appeal." (*People v. Davenport* (1985) 41 Cal.3d 247, 282 [221 Cal.Rptr. 794, 710 P.2d 861].) Defendant is unpersuasive in arguing that he should be excepted from this general rule.

circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation."

In the notice of evidence in aggravation the prosecutor included the accusation of sexual offenses on the child victim, adding in a supplemental notice filed four days later a police report of an interview with the child detailing the assaults. That report mentioned the child's mother, stating that the victim had reported the incidents to her mother two years after they occurred. Neither the notice, nor the police report, advised that the mother would be called to testify that she had confronted defendant with the child's accusation, which he had not denied. The mother's testimony was admitted at the penalty trial as evidence of an adoptive admission of the conduct by defendant. Defendant was notified that the mother would be called on the morning she testified. The prosecutor advised the court and defense counsel that he had first spoken with the witness that morning and only then learned that she had confronted defendant with the child's accusations. Defendant's objection to admission of the testimony was overruled. Defendant contends that this was prejudicial error since the adoptive admission was the only penalty phase evidence of aggravating factors apart from the victim's own testimony regarding the sexual offenses and the evidence of her hearsay statements about them.

Defendant, however, did not object to admission of the evidence on the ground he now asserts in support of his claim of error. Rather, he explained to the court before the penalty trial began that he would object to admission of the mother's testimony on grounds that the hearsay statements would deny his right of confrontation and cross-examination, a claim he does not renew on appeal. He did state in addition that he had not been furnished with anything that described what the proffered testimony would be and had not been able to anticipate that such testimony would be offered, an objection that appears to refer to failure

to make pretrial disclosure of evidence, not failure to comply with the notice requirement of section 190.3. Finally, defense counsel stated: "It's essentially an evidence brought on a hearsay objection. [*Sic.*]" When the testimony was actually offered, the objection was based solely on denial of defendant's confrontation rights.

Even under a broad reading of the objection as explained to the court before the penalty trial commenced, however, we find no error in admitting the evidence. Section 190.3 has been construed as requiring pretrial notice of the actual evidence on which the prosecution intends to rely to establish aggravating factors at the penalty phase. (*Keenan v. Superior Court* (1981) 126 Cal.App.3d 576, 586-587 [177 Cal.Rptr. 841]. See also *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25 [222 Cal.Rptr. 127, 711 P.2d 423].) The apparent intent underlying that notice provision, however, is to afford capital defendants notice of the evidence actually to be used at the penalty phase without the necessity of resort to the discovery procedures utilized to obtain information about the evidence on which the prosecution may rely to establish guilt, i.e., an accused is entitled to any pretrial knowledge of any unprivileged evidence. Therefore, the prosecutor must reveal all evidence of which it is then aware. (Accord, *People v. Keenan* (1988) 46 Cal.3d 478, 524 [250 Cal.Rptr. 550, 758 P.2d 1081].)

Nothing in the language of section 190.3, however, suggests that it was intended to grant the defendant any greater rights with respect to penalty phase evidence, or that evidence of which the prosecution had no knowledge when the original notice is given must be excluded. Such a construction would be inconsistent with the purpose of section 190.3 that the jury be made aware of all of the factors bearing on the penalty decision. As with guilt phase evidence of which the prosecution becomes aware after compliance with the initial discovery request, the defendant is entitled to prompt notice of the newly discovered evidence, and, if necessary, to a reasonable continuance to enable him to prepare to meet that evidence. If the prosecution delay is unreasonable or unexcused or if the delay will prejudice the defense, the court must exclude the evidence. (See *People v. Howard* (1988) 44 Cal.3d 375,

419-425 [243 Cal.Rptr. 842, 749 P.2d 279].)

Here the prosecutor notified counsel as soon as he learned of the evidence, and offered to stipulate to a short continuance to enable defense counsel to interview the witness. Thus, the failure to give notice earlier did not bar introduction of the evidence. Since defendant had notice and was afforded the opportunity to prepare to meet the evidence, he was not denied any rights under the notice provision of section 190.3. (See *People v. Howard, supra*, 44 Cal.3d at p. 425; *People v. Miranda, supra*, 44 Cal.3d at pp. 96-97.)

B. Other Penalty Trial Claims.

1. Jury unanimity.

Defendant claims that the court erred in instructing the jury that unanimous agreement that defendant committed the criminal conduct asserted as aggravating factors was not required, and that an individual juror who was satisfied beyond a reasonable doubt that defendant committed the offense could consider it in making the penalty determination. We held, however, in *People v. Rodriguez, supra*, 42 Cal.3d 730, 777-778, that unanimity was not required either by the statute or as a constitutional procedural safeguard. (See also *People v. Miranda, supra*, 44 Cal.3d 57, 99; *People v. Ghent, supra*, 43 Cal.3d 739, 773-774; *People v. Allen* (1986) 42 Cal.3d 1222, 1285 [232 Cal.Rptr. 849, 729 P.2d 115].)

2. Failure to delete reference to irrelevant mitigating factors.

Defendant's claim that the court should have deleted reference to irrelevant mitigating factors from the instructions given to the jury regarding the aggravating and mitigating factors to be considered in determining the appropriate penalty is one rejected by this court in several recent cases. As we explained in *People v. Melton, supra*, 44 Cal.3d 713, 770-771, giving instructions as to all of the statutory aggravating and mitigating factors ensures that the jury is aware of the

complete range of factors that the state considers relevant to the penalty determination. With that knowledge the jury is better able to place the individual defendant's conduct in perspective, and thus its exercise of discretion to select the appropriate penalty is further channeled and directed as required by the Eighth Amendment. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 192 [49 L.Ed.2d 859, 885, 96 S.Ct. 2909].)

Reference to all statutory mitigating factors, moreover, ensures that the defendant is not prejudiced by the omission of any that the jurors might conclude do apply. (*People v. Ruiz* (1988) 44 Cal.3d 589, 619 [244 Cal.Rptr. 200, 749 P.2d 854].) A jury advised by the court to consider any statutory factor that is applicable is capable of making that determination. *(People v. Ghent, supra*, 43 Cal.3d 739, 776-777.)

3. Permitting consideration of defendant's age.

Defendant next contends that the court erred in instructing the jury, in the language of factor (i) of section 190.3, that among the factors to be considered in determining the penalty, if relevant, is "[t]he age of the defendant at the time of the crime." He contends age may be considered only as a mitigating factor, but the failure of the court to so advise the jury permitted his age to be considered as an aggravating factor.

In *People v. Rodriguez, supra*, 42 Cal.3d 730, 789, we held that "mere chronological age, a factor over which one can exercise no control, should not *of itself* be deemed an *aggravating* factor." (Italics added.) We have not condemned all reference to age, however. Mere chronological age by itself is something over which a defendant has no control, and therefore is not relevant to the penalty decision as either a mitigating or an aggravating factor. The age "factor," however, permits the jury to consider "any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (*People v. Lucky* (1986) 45 Cal.3d 259, 302 [247 Cal.Rptr. 1, 753 P.2d 1052].)

In this case, although the court gave no supplementary instruction regarding the age factor, the prosecutor's argument appropriately placed that factor in the perspective approved by this court in *Lucky* and *Rodriguez*. His argument was structured in such a way that the jury was first reminded that the court had already advised them of the various factors to be considered in the penalty determination. He did not expressly refer to each factor in discussing what the evidence reflected as to the circumstances of the offense and of defendant. He made no reference to the "age" factor as such, but stated: "Mr. Jennings is no neophyte. He was 32 years old at the time these crimes against Violet Newman were committed. He was no 18-year-old, or 19-year-old. Wise to the ways of the world; had lived outside the family home; had married; had children; had substantial contact with the police in his work as an informant. No neophyte at all."

The jury was given appropriate guidance regarding the relevance of the age factor by this argument.

4. Consideration of excessive special circumstances.

The instructions given at the penalty phase, again mirroring the statutory language (§ 190.3, factor (a)), advised the jury that in determining the penalty it should take into account: "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true...." Defendant claims that this instruction erroneously permitted the jury to consider both the robbery special circumstance and the burglary special circumstance even though both arose out of the same set of facts arising from a single criminal objective.

This claim, based on the plurality opinion in *People v. Harris* (1984) 36 Cal.3d 36, 60-67 [201 Cal.Rptr. 782, 679 P.2d 433], was rejected by the court in *People v. Melton, supra*, 44 Cal.3d 713, 765-767. In this case there was no suggestion by the prosecutor that the special circumstances which the jury had found true or that any other aggravating factors should be considered mechanically, that is that the number of factors or special circumstances should be determinative in

the penalty decision.[22/] To the contrary rather than exploiting the sheer number of special circumstances, again without special mention of them, the prosecutor asked the jury to consider the actual circumstances of the

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22. With some prescience (see *People v. Allen, supra*, 42 Cal.3d 1222, 1276-1277; *People v. Brown* (1985) 40 Cal.3d 512, 541 [220 Cal.Rptr. 637, 709 P.2d 440], revd. *California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]), the prosecutor explained to the jury: "It is not a question of simply counting up the numbers of factors on one side and placing them against the number of factors on the other side. What it involves is a weighing process that requires you to bring to the thought process and deliberation process a subjective process of placing weight, value upon the items that you have been directed to consider, and in a very real sense what is brought to that process is the very value system that you have individually and as representatives of the community from which you come.

"How you give weight to each of these factors that you have been directed to consider and take into account will in large measure be an expression of the values held by you individually as representatives of this community in looking at the facts of this case...."

Defendant's counsel reemphasized this point during his argument: "I think it's appropriate that I tell you again that this is not a process of arithmetic that you are to enter upon. This is not a matter of deciding if there are six aggravating factors and five mitigating factors.... Your function is to weigh how important any one of those factors might be and to then, based upon the weight of those factors that are on either side of your scale, find out what this tells you that you must do for a verdict in this case."

crime and the societal values which defendant's conduct invaded.[23]

5. Instruction to disregard consequences of verdict.

In *People v. Brown, supra*, 40 Cal.3d 512, 537, footnote 7, we held that CALJIC No. 1.00, instructing the jury that it should reach a just verdict "regardless of what the consequences of such verdict may be," should not be given at the penalty phase of a capital trial. In this case, tried before our *Brown* decision, that instruction was among the introductory penalty phase instructions given by the court prior to the arguments of counsel.

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23. During the argument, in which he asked the jury to focus on "who, where, why, and how," the prosecutor referred to the location in which the offenses occurred, stating: "[T]here is something important that stems from our system of values about where this crime occurred. You've heard from the time you were small probably the phrase, 'A man's house is his castle.' That's an expression of value.... Crimes of which Mr. Jennings has been convicted violate that value to the very core, committed in the home of Mrs. Newman and in her own bed, aggravating in the extreme."

The prosecutor referred to the robbery only in his general discussion of "why" the crimes had been committed, suggesting "pleasure, personal gain, and a desire to exploit somebody else. You see, it does make a difference why a crime is committed. It does make a difference, and if Mr. Jennings had stolen from Mrs. Newman because he had no food or because he had a family that had nothing and he was the sole source of their support, one could understand with some compassion that kind of motivation, but what was his motivation? Pleasure stealing of money, personal gain, pleasurement ... The 'why' strikes at values that are important to each of you."

Our disapproval of the instruction lay in its potential to diminish the jury's sense of responsibility for the penalty decision it was to reach since the precise issue before the jury — whether the penalty shall be death or life imprisonment without possibility of parole — is the "consequence" of the verdict. Instructions which lead a jury to believe that responsibility lies elsewhere for determining that death is the appropriate penalty are constitutionally impermissible. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [86 L.Ed.2d 231, 239, 105 S.Ct. 2633]; *People v. Milner* (1988) 45 Cal.3d 227, 253 254 [246 Cal.Rptr. 713, 753 P.2d 669].)

It is clear, however, in this case that the jury was not misled and did understand that the consequences of the verdict were the personal responsibility of the jurors. The prosecutor acknowledged the serious nature of the task. Defense counsel referred to the function of the jurors as "frightening," and as the exercise of godlike power to take human life. We are satisfied, therefore, that the instruction, although erroneously given, was not prejudicial.

6. *Brown* (CALJIC No. 8.84.2) error.

The instructions to the jury regarding its consideration of the evidence of aggravating and mitigating factors told the jurors simply that "if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." The instructions did not elaborate on the duty of the jury to ensure that the jurors were aware both that the weighing process was not a mechanical one and that the weight to be assigned to any factor was left to their judgment, and of the full scope of their discretion to determine the appropriate penalty and to opt for life imprisonment without possibility of parole on the basis of any mitigating evidence or sympathy factor. In *People v. Brown, supra*, 40 Cal.3d 512, 544, footnote 7, and *People v. Easley, supra*, 34 Cal.3d 858, 881-884, we held that in future cases clarifying instructions should be given to avoid any misunderstanding on the part of the jury as to its obligations and discretion. In cases tried before *Brown*, we examine the record, including the argument of

counsel, to determine whether there is any reasonable likelihood that the jurors misunderstood their role.

In this case our task is not difficult. In addition to instructing the jury on the statutory factors in aggravation and mitigation set forth in section 190.3, the judge instructed that the jury was to consider: "any other aspect of the defendant's character or record that supports a verdict of confinement in state prison for life without the possibility of parole" and "sympathy and/or pity for the defendant." These instructions, coupled with the prosecutor's argument, were adequate to ensure that the jury fully understood the scope of its discretion and how that discretion was to be applied. Not only did the prosecutor fully advise the jury with respect to the manner in which it should weigh the evidence of aggravating and mitigating factors, but he also expressly advised the jury that it could reject death as a penalty on the basis of sympathy regardless of whether that sympathy for the defendant was supported by evidence introduced at the trial.[24/] The scope of its sentencing discretion could not

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24. Concluding his argument the prosecutor said: "Let me end by talking to you about one of the final factors that's in the laundry list in your instructions. It's the factor called 'sympathy and pity.'

"You've been repeatedly told throughout this whole trial that in making the fact decision that you have to make, that you are not to make those decisions based upon sympathy or pity for the defendant or for anger against him and so forth. You've been repeatedly told that in the process of making factual decisions you're not to use sympathy or pity.

"*The law does allow, however that in deciding whether or not the defendant shall receive a verdict of death or a verdict of life in prison without the possibility of parole, you are entitled, if you wish, to do so because of pity and sympathy for the defendant.* There is a place in courtrooms, there is a place

have been made more clear to the jury.

7. Burden of proof that death is appropriate.

Defendant argues that a capital jury must be instructed that it must be satisfied beyond a reasonable doubt that death is the appropriate penalty if the punishment is to be imposed. That claim, too, has been rejected in several recent decisions of this court. (See *People v. Melton, supra*, 44 Cal.3d 713, 762-763; *People v. Miranda, supra*, 44 Cal.3d 57, 107.)

V.

Modification Application

Finally defendant contends that remand for reconsideration of the application for modification of penalty deemed to be made pursuant to subdivision (e) of section 190.4 is required because the trial court misunderstood the factors to be considered and failed to properly consider mitigating evidence.

Defendant's claim is based on the trial judge's remark that he considered defendant's age to be an aggravating factor, and what he believes was a literal understanding of "factor (k)," which permits consideration of any circumstance which "extenuates the gravity of the

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in the criminal justice system for mercy, sympathy, and compassion. It is not a stranger to courtrooms, but there are also times when pity and mercy and sympathy are inappropriate. Times when it is right to hold somebody strictly accountable for the consequences of his or her conduct, and *if you make a decision in this case, as you're legally entitled to do based upon factually unjustified sympathy,* just sympathy based on a whim or just on sheer emotions, the whole rule of law is undermined." (Italics added.)

crime even though it is not a legal excuse for the crime." (§ 190.3, factor (k).) Read in context, however, the court's statement regarding defendant's age suggests that the court meant nothing more than rejection of age as a mitigating factor. Nor does the court's statement suggest that the judge did not fully understand his responsibility to consider all evidence offered in mitigation, not simply that related to the circumstances of the crime.

Section 190.4, subdivision (e), directs: "In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings." In his statement reciting the statutory factors in aggravation and mitigation, and his findings as to each, the trial judge said: "The tenth factor to be considered is the age of the defendant at the time of the crimes. The defendant was born in 1950 and was, at the time of the commission of these offenses, 32 years old. The Court finds this factor to be an aggravating factor since by the age of 33 this defendant, from all of the evidence presented, had reached his full level of maturity. His conduct then, neither cannot nor should not be mitigated because he was neither old enough to fully understand the character and nature of his conduct nor because he was so old as to be considered infirm thereby allowing age to become a factor in mitigation." Nothing elsewhere in the court's statement suggests that the judge believed the absence of a mitigating factor to be aggravating. The statement may reflect nothing more than a belief that defendant's age could not be considered a mitigating factor, but even if the court weighed it as an aggravating factor, the misunderstanding was not prejudicial.

That the court understood that conduct unrelated to the circumstances of the offense could and must be considered when offered in mitigation is made clear by the express statement of the judge: "The final factor is (k) 'Any other circumstance which extenuates the gravity

of the crimes even though it is not a legal excuse for the crimes.'

"*The court has considered all the evidence including that of the defendant's activities as a police informant, and concludes that there are no circumstances which extenuate the gravity of the crimes the defendant has committed.*" (Italics added.)

VI.

Victim Impact Statement

The victim's son was permitted to address the court prior to the ruling on the section 190.4 motion for modification. He offered the views of the family, recited personal knowledge of defendant whom he characterized as a "bully" and "braggart" who "loved to fight," and described the impact of the crime on the family members.

In *Booth v. Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529], the United States Supreme Court held that a similar "victim impact statement" could not constitutionally be presented to the sentencing authority — there the jury — in a capital case. The court reasoned that it was not relevant to any issue the jury was called on to decide in selecting the appropriate penalty, and would divert the jury from the focus on the defendant "as a uniquely individual human being" which is required in capital sentencing. In broad concluding language, the court stated that "the introduction of a VIS at the sentencing phase of a capital murder trial violates the Eighth Amendment. ..." (96 L.Ed.2d at p. 452.)

Therefore, although consideration of the victim impact statement by the sentencer is authorized when sentence is imposed under the Determinate Sentencing Act (§ 1170 et seq.),[25/] a capital jury may not

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25. The victim's son was permitted to make the statement pursuant to section 1191.1, enacted as part of

consider that kind of "victim impact," and the court should not consider such evidence of victim impact prior to ruling on the section 190.4 motion. (See *People v. Williams* (1988) 45 Cal.3d 1268, 1328 [248 Cal.Rptr. 834, 756 P.2d 221]; *People v. Babbitt* (1988) 45 Cal.3d 660, 724-725 [248 Cal.Rptr. 69, 755 P.2d 253].) While the Eighth Amendment considerations noted by the United States Supreme Court are not implicated at that proceeding, evidence of victim impact is irrelevant to the determination the court is required to make. The function of the trial judge in ruling on the application for modification is to "make an independent determination whether the death penalty is proper in light of the relevant evidence and the applicable law ..." and to determine if the weight of the evidence supports the jury verdict after assessing the credibility of the witnesses, determining the probative force of the testimony, and weighing the evidence. Thus, the evidence that the court is to review is only that which was before the jury.

The record in this case satisfied us that the trial court did no more. Consideration of the statement by the victim's son did not enter into the ruling denying modification.

VII.

Proportionality Review

Defendant asks that the court undertake proportionality review of the judgment imposing the sentence of death on him. Although such review is not constitutionally mandated (*Pulley v. Harris* (1984) 465

Proposition 8 on June 8, 1982. The statute provides, inter alia: "The victim ... or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentencing shall consider the statements ... made pursuant to this section ...."

U.S. 37, 51-54 [79 L.Ed.2d 29, 41-43, 104 S.Ct. 871]), the Eighth Amendment and article I, section 17 of the California Constitution preclude the imposition of punishment that is not proportionate to individual culpability. (*Solem v. Helm* (1983) 463 U.S. 277, 290 [77 L.Ed.2d 637, 649, 103 S.Ct. 3001]; *People v. Bean, ante*, p. 919.) We are therefore obligated to set aside the penalty in any case in which it is aberrant or appears to have been imposed in an arbitrary or capricious manner. Our review of the record in this case supports the conclusion of the trial judge that the record fully supports the finding of the jury that death is the appropriate penalty in light of the circumstances of the crime and of defendant.

VIII.

There being no error prejudicial to the defendant at the guilt or penalty phase of the trial, the judgment is affirmed in all respects.

Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., Arguelles, J., and Kaufman, J., concurred.

Appellant's petition for a rehearing was denied November 10, 1988, and the opinion was modified to read as printed above.